(25,572)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 742.

L. A. WESTERMANN COMPANY, PETITIONER,

vs.

THE DISPATCH PRINTING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 8, 1917.

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a United States Circuit Court of Appeals, Sixth Circuit.

No. 2663.

L. A. WESTERMANN COMPANY, Plaintiff in Error,

vs.

THE DISPATCH PRINTING COMPANY, Defendant in Error,

Appeal from the District Court of the United States for the Southern District of Ohio, Eastern Division.

RECORD.

1 TRANSCRIPT OF RECORD.

THE UNITED STATES OF AMERICA,
Southern District of Ohio,
Eastern Division, ss:

In the District Court of the United States within and for the District Aforesaid.

Present: The Honorable John E. Sater, District Judge.

Among the proceedings then and there had were the following, to wit:

On August 2, 1912, a certain bill in equity was filed with the clerk of said court, which bill in equity is clothed in the words and figures following, to wit:

No. 1649.

L. A. WESTERMANN COMPANY, Plaintiff,

vs.

THE DISPATCH PRINTING COMPANY, Defendant.

Bill in Equity.

Filed August 2, 1912.

To the Honorable John E. Sater, Judge of the District Court of the United States for the Southern District of Ohio, Eastern Division:

L. A. Westermann Company, a corporation duly organized and existing under the laws of the State of New York, and a citizen of that state brings this its bill against The Dispatch Printing Com-

pany, a corporation of the State of Ohio, having its principal place of business in the city of Columbus, Ohio, and thereupon your orator complains and says:

First. Your orator is and was at all the times herein referred to a corporation duly created and existing under and by virtue of the laws of the State of New York, and is and was at such times a citizen of that state; that the defendant, The Dispatch Printing Company, is and was at all the times herein referred to a corporation organized and doing business under and by virtue of the laws of the State of Ohio, and was during such times engaged in the publication of a daily newspaper, printed and published in the city of Columbus, Ohio, and having a large circulation throughout said city of Columbus and State of Ohio, and in the publication of said newspaper said defendant, The Columbus Dispatch Printing Company received and published for profit numerous advertisements.

2 Second. Your orator during all such times was engaged in the business of designing and vending under the protection of lawful copyrights suitable and appropriate prints and pictorial illustrations to be used by such milliners and merchants as might secure from your orator the right so to do in advertising their business; and by reason of the skill and artistic sense employed by it in its said business and by large expenditures of money and efforts in making known to its customers the advantages of such prints your orator has built up a successful and profitable business in that line, the success and profit of which however is wholly dependent upon the protection and right afforded your orator and the fruits of its industry and skill under the copyright laws; and as a part of its said business your orator designed and executed certain prints and pictorial illustrations, hereinafter specifically described, for the purpose aforesaid, and secured copyrights thereon in conformity with the statutes in that respect, by publication thereof with a notice of copyright in due form affixed to each copy thereof and promptly depositing in the copyright office at Washington, D. C., two complete copies of each of said prints and pictorial illustrations and the register of copyrights did thereupon issue to it a certificate of copyright registration of said prints and pictorial illustrations as required by law.

That one of the prints and pictorial illustrations so copyrighted by your orator is entitled "Intrigue," and the date of its publication as aforesaid is September 1st, 1911, its entry Class K, XXc, No. 28861, and copies thereof were delivered to and received by the register of copyrights on September 11th, 1911, and he thereupon issued to your orator his certificate of copyright registration as required by law, a copy of which said print and pictorial illustration entitled "Intrigue," copyrighted as aforesaid, is hereto attached and made a part hereof and marked Exhibit "A";

Another of the prints and pictorial illustrations so copyrighted by the plaintiff is entitled "Irene," and the date of its publication as aforesaid is September 1st, 1911, its entry Class K, XXc, No. 28864, and copies thereof were delivered to and received by the register of copyrights on September 11th, 1911, and he thereupon

issued to your orator his certificate of copyright registration as required by law, a copy of which said print and pictorial illustration entitled "Irene," copyrighted as aforesaid, is hereto attached and made a part hereof and marked Exhibit "B";

3 Another of the prints and pictorial illustrations so copyrighted by the plaintiff is entitled "Impact," and the date of its publication as aforesaid is September 1st, 1911, its entry Class K, XXc, No. 28845, and copies thereof were delivered to and received by the register of copyrights on September 11th, 1911, and he thereupon issued to your orator his certificate of copyright registration as required by law, a copy of which said print and pictorial illustration entitled "Impact," copyrighted as aforesaid, is hereto attached and made a part hereof and marked Exhibit "C";

Another of the prints and pictorial illustrations so copyrighted by the plaintiff is entitled "Hake," and the date of its publication as aforesaid is August 15th, 1911, its entry Class K, XXc, No. 27945, and copies thereof were delivered to and received by the register of copyrights on August 16th, 1911, and he thereupon issued to your orator his certificate of copyright registration as required by law, a copy of which said print and pictorial illustration entitled "Hake," copyrighted as aforesaid, is hereto attached and made a part hereof and marked Exhibit "D";

Another of the prints and pictorial illustrations so copyrighted by the plaintiff is entitled "Hack" and the date of its publication as aforesaid is August 15th, 1911, its entry Class K, XXc, No. 27975, and copies thereof were delivered to and received by the register of copyrights on August 16th, 1911, and he thereupon issued to your orator his certificate of copyright registration as required by law, a copy of which said print and pictorial illustration entitled "Hack" copyrighted as aforesaid, is hereto attached, and made a part hereof and marked Exhibit "E";

Another of the prints and pictorial illustrations so copyrighted by the plaintiff is entitled "Jury" and the date of its publication as aforesaid is September 19th, 1911, its entry Class K, XXc, No. 29789, and copies thereof were delivered to and received by the register of copyrights on September 27th, 1911, and he thereupon issued to your orator his certificate of copyright registration as required by law, a copy of which said print and pictorial illustration entitled "Jury" copyrighted as aforesaid, is hereto attached and made a part hereof and marked Exhibit "F."

Third. The defendant infringed on copyrights of your orator and each of them, by causing to be printed, reprinted and published without any authority or right so to do from your orator,

4 many copies of said print and pictorial illustration entitled "Intrigue" to wit: Thirty-five thousand (35,000) copies as a part of an advertisement for The Fashion in The Columbus Evening Dispatch, a newspaper of great and wide circulation in the city of Columbus, Ohio, and adjacent country, on Tuesday, September 19th, 1911, said defendant company, the owner, proprietor and publisher of said Columbus Evening Dispatch on said date, having itself printed, published and caused to be printed and published said ad-

vertisement and said print and pictorial illustration entitled "Intrigue," a copy of said print and pictorial illustration printed and published as aforesaid constituting the said infringement is herewith filed and made a part hereof and marked Exhibit "AA";

And by likewise printing, reprinting and publishing without such authority or right many copies of said print and pictorial illustration entitled "Irene" to wit: Thirty-five thousand (35,000) copies as a part of an advertisement for The Walter J. Dwyer Company in the Columbus Evening Dispatch, a newspaper of great and wide circulation in the city of Columbus, Ohio, and adjacent territory, on Thursday, September 21st, 1911, said defendant company, the owner, proprietor and publisher of said Columbus Evening Dispatch on said date, having itself printed, published and caused to be printed and published said advertisement and said print and pictorial illustration entitled "Irene," a copy of said print and pictorial illustration printed and published as aforesaid constituting the said infringement is herewith filed and made a part of this petition marked "BB";

And by likewise printing, reprinting and publishing without such authority or right many copies of said print and pictorial illustraton entitled "Impact" to wit: Thirty-five thousand (35,000) copies as a part of an advertisement for Childs Dry Goods Company in The Columbus Evening Dispatch, a newspaper of great and wide circulation in the city of Columbus, Ohio, and adjacent territory, on Friday, September 29th, 1911, said defendant company, the owner, proprietor and publisher of said Columbus Evening Dispatch on said date, having itself printed, published and caused to be printed and published said advertisement and said print and pictorial illustration entitled "Impact," a copy of said print and pictorial illustration printed and published as aforesaid constituting the said infringement is herewith filed and made a part of this petition marked Exhibit "CC";

And by likewise printing, reprinting and publishing without such authority or right many copies of said print and pictorial
5 illustrations entitled "Hake" to wit: Forty thousand (40,000) copies as a part of an advertisement for The Columbus Millinery Supply House in The Columbus Sunday Dispatch, a newspaper of great and wide circulation in the city of Columbus, Ohio, and adjacent territory, on Sunday, October 1st, 1911, said defendant company, the owner, proprietor and publisher of said Columbus Sunday Dispatch on said date having itself printed, published and caused to be printed and published said advertisement and said print and pictorial illustration entitled "Hake," a copy of said print and pictorial illustration printed and published as aforesaid constituting the said infringement is herewith filed and made a part of this petition marked Exhibit "DD";

And by likewise printing, reprinting and publishing without such authority or right many copies of said print and pictorial illustration entitled "Hack" to wit: Forty thousand (40,000) copies as a part of an advertisement for the The New Idea In Millinary in The Columbus Sunday Dispatch, a newspaper of great and wide circula-

tion in the city of Columbus, Ohio, and adjacent territory on Sunday October 8th, 1911, said defendant company, the owner, proprietor and publisher of said The Columbus Sunday Dispatch on said date having itself printed, published and caused to be printed and published said advertisement and said print and pictorial illustration entitled "Hack," a copy of said print and pictorial illustration printed and published as aforesaid constituting the said infringement is herewith filed and made a part hereof and marked Exhibit "EE";

And by likewise printing, reprinting and publishing without such authority or right many copies of said print and pictorial illustration entitled "Jury" to wit; forty thousand (40,000) copies as a part of an advertisement for The Columbus Millinery Supply House in The Columbus Sunday Dispatch, a newspaper of great and wide circulation in the city of Columbus, Ohio and adjacent territory, on Sunday, October 15th, 1911, said defendant company, the owner, proprietor and publisher of said The Columbus Sunday Dispatch on said date having itself printed, published and caused to be printed and published said advertisement and said print and pictorial illustration entitled "Jury," a copy of said print and pictorial illustration printed and published as aforesaid constituting the said infringement is herewith filed and made a part hereof and marked Exhibit "FF";

And by likewise printing, reprinting and publishing without such authority or right so to do from your orator many copies of
6 said print and pictorial illustration entitled "Jury," to wit; thirty-five — (35,000) copies as a part of an advertisement for The Max H. Rieser Co. in The Columbus Evening Dispatch, a newspaper of great and wide circulation in the city of Columbus, Ohio, and adjacent territory, on Friday, November 10th, 1911, said defendant company, the owner, proprietor and publisher of said The Columbus Evening Dispatch on said date having itself printed, published and caused to be printed and published said advertisement and said print and pictorial illustration entitled "Jury" a copy of said print and pictorial illustration printed and published as aforesaid constituting the said infringement is herewith filed and made a part of this petition marked Exhibit "FFF."

That by the use of said prints and pictorial illustrations in such advertisements and publications and by infringing upon your orator's copyrights as aforesaid the defendant has damaged this plaintiff, in the sum of thirty-five thousand ($35,000) dollars.

In consideration whereof, and forasmuch as your orator is without adequate remedy, save in a court of equity, your orator prays this honorable court to issue its writ of subpœna in due form of law directed to the said The Dispatch Printing Company, the defendant aforesaid, commanding it at a certain day and under a certain penalty to be therein specified, to appear before this honorable court to answer all and singular the matters and things hereinbefore set forth and complained of, but the answers to the bill of complaint need not be under oath and answer under oath being hereby expressly waived.

And your orator further prays that the defendant may be restrained by injunction, preliminary until final hearing herein and perpetual thereafter, from printing or in any other way making copies of, or selling or distributing or publishing copies of, the said prints and pictorial illustrations copyrighted by your orator as aforesaid; that the said defendant may be required to surrender and deliver to your orator all of the cuts and plates by means whereof the said defendant has made the said copies of said copyrighted prints and pictorial illustrations; that the said defendant may be decreed to render an account of all of the said prints and pictorial illustrations which have been published, and of the said newspapers in which the same have been published, and to pay to the plaintiff, in lieu of actual damages and profits, damages in the sum of thirty-five thousand ($35,000) dollars as provided by the Act of Congress;
7 and that the court award to the plaintiff reasonable attorney's fees, for the services of its attorneys in this suit as a part of the costs hereof; and that your orator may have such other and further relief as the nature and circumstances of the case may require, and as to this court shall seem just and equitable.

C. C. WILLIAMS,
SIMEON NASH,
R. M. LUCAS,
Solicitors for L. A. Westermann Company.

(Here follow diagrams marked pp. 7 to 19, inclusive.)

EXHIBIT "A."

INTRIGUE—Size B
Mat, $2.00; Electro, $2.50

INTRIGUE—Size A
Mat, $2.50; Electro, $3.00
Both Sizes, A and B Mats, $3.00
Both Electros, $3.50

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Westermann Co
v
Dispatch Printing Co

L. 7

EXHIBIT "AA."

THE COLUMBUS EVENING DISPATCH, TUESDAY, SEPTEMBER 19, 1911

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show
and e
were he
of the h
ment ·

Firs

In a vari
lined with
tomorrow

Exclusive
beautifully
sold at $35

W

Miss
house of
Every Da
women of

The Fashion
HIGH AND STATE

#1742.
Westermann Co
v.
Dispatch Printing Co
$8

EXHIBIT "B."

September 1st, 1911 Page 45

#742.

L. A. WESTERMANN COMPANY

Westermann Co.
v
Dispatch Printing Co.
79.

EXHIBIT "BB."

THE COLUMBUS EVENING DISPATCH, THURSDAY, SEPTEMBER 21, 1911.

THE
WALTER J. DWYER Co
89 North High Street
NO CONNECTION WITH ANY OTHER STORE

.742

Westermann Co.
v.
Dispatch
Printing Co.
} #10.

EXHIBIT "C."

IMPACT—Size A
Mat, $2.50; Electro, $3.00
Both Sizes, A and B Mats, $3.00
Both Electros, $3.50

IMPACT—Size B
Mat, $2.00; Electro, $2.50

742

Westermann Co.
v
Dispatch Printing Co. } P 11.

EXHIBIT "CC."

THE COLUMBUS EVENING DISPATCH, FRIDAY, SEPTEMBER 30, 1911.

CHLEY

S OF SERVICE

Suit L

Hundreds of be tailored Suits. Plai hairline stripes, ala and gray mixture style $15.00 values

Handsome Mixtu and dark colors checks of blue ar and rose, brown with a guar $18.00 val ued

Sweil B in black, b green, trim some brow beautiful tures. Oth ues at sa price

$14.

Handsome imper Suits in black, navy nation tan with bo plain extra fine m big variety of figh our regular $20.50 Suits

$25 All our l plain an rials in regular v including up to size 47

CHILDS

HIGH AND BROAD STREETS

742

Westermann Co.
v.
Dispatch Printing Co. } $12.

EXHIBIT "D."

HAKE—Size A
Mat, $3.50; Electro, $4.00
Both Sizes, A and B Mats, $4.00
Both Electros, $4.50

HAKE—Size B
Mat, $2.50; Electro, $3.00

7/62.

Westermann Co.
v.
Dispatch Printing Co. } 7/13.

EXHIBIT "DD."

THE

Columbus Millinery Supply House

51-53 EAST CHESTNUT ST.

3 Doors West of Postoffice

"We Retail at Wholesale Prices"

#742

Westermann Co.
v.
Despatch Printing Co.
} #14

EXHIBIT "E."

HACK—Size A
Mat, $3.00; Electro, $3.50
Both Sizes, A and B Mats, $3.50
Both Electros, $4.00

J 42.

Westerman Co.
v
Dispatch Printing Co.
} P 15.

EXHIBIT "EE."

—Hats Trimmed Free When S

Exhibit "E E"

Rare

DRESS

This week we o
colors. In our g
finish and Woo
and the new
Dutch Bonnet
and Colored
to go at the

95

Remember, We Always Sell You High-Grade Millinery at Just ONE-HALF the Retail Milliners' Prices

THE NEW IDEA IN MILLINERY

234 NORTH HIGH STREET Opposite High Street Theater

742.

Westermann Co
v.
Dispatch Printing Co

P16.

EXHIBIT "F."

JURY—Size A
Mat, $2.50; Electro, $3.00
Both Sizes, A and B Mats, $3.00
Both Electros, $3.50

JURY—Size B
Mat, $2.00; Electro, $2.50

742.

Meetermau Co.
v
Dispatch Printing Co.
} P 17

EXHIBIT "FF."

THE

Columbus Millinery Supply House

51-53 EAST CHESTNUT ST.

3 Doors West of Postoffice "We Retail at Wholesale Prices"

742.

Westerman Co

v

Dispatch Printing Co } # 18

EXHIBIT "FFF."

COLUMBUS EVENING DISPATCH, FRIDAY, NOVEMBER 10, 1911.

A new lot of UNTRIMMED HATS at ... demand for our 31c Hats earlier in the ... sted ... only, but in order to ... bought ...

The Max H. Rieser Co

Main Street, Between High and Third

#742.

Westerman Co.
v.
Dispatch Printing Co.

P 19.

20 *Entry of Appearance.*

Filed September 2, 1912.

To the Clerk of said Court:

Please enter the appearance of The Dispatch Printing Company, a corporation, defendant in the above cause and of myself as solicitor as of the date of the filing hereof.

SMITH W. BENNETT, *Solicitor.*

Answer of the Defendant, The Dispatch Printing Company, to the Bill of Complaint.

Filed November 4, 1912.

This defendant, The Dispatch Printing Company, is and was at all the times herein referred to a corporation duly created and existing under and by virtue of the laws of the State of Ohio and a citizen of said state; and said defendant now and at all times hereafter saving to itself all and all manner of benefits by exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill of complaint, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

(1) It admits that the complainant was and is a corporation as averred in said bill and a citizen of the State of New York. It admits that said defendant was and is engaged in the publication of a daily newspaper printed and published in the city of Columbus, Ohio, and having a large circulation throughout said City of Columbus and State of Ohio, and admits that in the publication of said newspaper the said defendant received and published for profit numerous advertisements.

(2) This defendant has no information or belief whatsoever and does not know and cannot set forth as to whether or not the allegations are true as made by the said complainant in its said bill of complaint relative to being engaged in the business of designing and

21 vending under the protection of lawful copyrights, certain prints, pictorial illustrations as therein set forth, averred and contained; it has no information or belief that the publication complained of and the prints and pictorial illustrations therein contained were delivered to and received by the register of copyrights or were registered in the Department of the Register of Copyrights at Washington, D. C.; that with regard to each and all of said allegations as pertained to complainant's having secured such copyrights and the investments therein made by it, this defendant is not informed and therefore leaves the complainant to make such proof thereof as it shall be able to produce.

(3) This defendant in further answering said bill of complaint, especially denies that it infringed on any copyrights of said com-

plainant, either in the manner or at the times as averred in the said bill of complaint or otherwise.

It further denies that said complainant was in any manner damaged by any act or publication made by the defendant in its said newspaper in the said sum of $35,000 or in any other sum or amount.

(4) Defendant further says that it is the owner and publisher of a certain newspaper known as The Columbus Evening Dispatch, published daily and Sunday within the city of Columbus, county of Franklin and State of Ohio; that with regard to the publication of certain prints and pictorial illustrations set forth in the bill of complaint of the complainant, this defendant denies that the same were copies of the prints or illustrations averred in the bill of complaint to have been copyrighted by said complainant and it denies that it infringed on any prints or pictorial illustrations copyrighted by the said complainant; that with regard to the publication of the matter, prints and pictorial illustrations in said paper published by the said defendant and set forth in the bill of complaint of the complainant, still denying that the same were copyrighted matter, prints or pictorial illustrations, it alleges that it made use thereof for advertising purposes without any knowledge, actual or constructive, or means of knowing that said matter was copyrighted or that any property right therein was owned or claimed to be owned by the complainant; that said matter, prints and pictorial illustrations did not contain therein or thereon any mark or designation whereby to inform this answering defendant that the same was copyrighted or in any way protected from general use by the advertising public, and that the use thereof by the said defendant was in ignorance of any right or claim made thereto by the said complainant, and the publica-

22 tion thereof was made in good faith.

This answering defendant further alleges, still denying that the matter, prints and pictorial illustrations published by it at the time in said bill of complaint set forth were copyrighted, that it made no profits from the publication thereof.

Wherefore having made answer to those parts of complainant's bill of complaint considered material or necessary for this defendant to make answer to, this defendant prays that it may be hence dismissed with its reasonable costs and charges in this behalf sustained.

SMITH W. BENNETT,

Solicitor for The Dispatch Printing Company.

UNITED STATES OF AMERICA,
State of Ohio,
Franklin County, ss:

George E. Fowler, being first duly sworn, deposes and says that he is an officer and agent of the defendant, The Dispatch Printing Company, a corporation and the facts set forth and allegations contained therein are true as he believes.

GEORGE E. FOWLER.

Sworn to before me and signed in my presence by the said George E. Fowler, this 2nd day of November, A. D. 1912.

DONALD W. KLING,
Notary Public, Franklin County, O.

Replication of the Plaintiff, L. A. Westermann Company, to the Answer of the Defendant, The Dispatch Printing Company.

Filed November 8, 1912.

This repliant, saving and reserving to itself any and all manner of advantage of exceptions, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto, says that it does and will
23 aver, maintain and prove its said bill to be true, certain and sufficient in law to be answered by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law, to be replied unto by this repliant; that any matter or thing in said answer contained, material or effectual in law to be replied unto, is not true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

C. C. WILLIAMS,
SIMEON NASH,
R. M. LUCAS,
Solicitors for Plaintiff.

Journal Entry.

Entered November 19, 1912.

This day came both the parties, complainant and defendant, in person and by counsel, and this cause came on to be heard upon the application and motion of the complainant to take the whole of the testimony in this cause on behalf of both parties orally and in open court, on final hearing hereof, and the court being duly advised that notice has been given and accepted by the defendant herein, and that the same has been consented to by the defendant.

It is thereby by the court ordered that the taking of said testimony by commission before a special examiner be dispensed with and that the evidence in said cause be adduced orally in open court on the final hearing hereof.

24 *Order Waiving Trial by Jury and for Submission of Cause to the Court.*

Entered December 17, 1912.

This day came both the parties, complainant and defendant, by their counsel, and waived the submission of this cause and the issues

of fact involved therein to the jury, and consented to submission of this cause to the court without the intervention of a jury.

Order.

Entered January 6, 1913.

This day came both the parties, complainant and defendant, by their counsel, and agreed that this cause may be set for trial on the 15th day of January, 1913, and that the same shall be heard by the court on said date.

Memorandum.

Filed August 4, 1913.

SATER, *District Judge:*

Each of the bills sufficiently states a cause of action.

A corporation may obtain a copyright. Pictorial illustrations are copyrightable even if used for advertising purposes and depicting fashions in dresses, hats and other articles of apparel. National Cloak & Suit Co. v. Kaufman, 189 Fed. Rep., 215; Bleistein v. Donaldson Lith. Co., 188 U. S., 239.

The proof of proper registration of the pictorial illustrations mentioned in the pleadings is sufficient. The plaintiff, however, has no right of action for any publication of any picture copyrighted by Gimbel Brothers, which was published by the Ohio State Journal Company prior to the assignment of the copyright by Gimbel Brothers to the plaintiff. The assignment does not carry the right to sue for damages for any prior infringement. The assignment purports to have been made on April 18, 1911, and recorded on April 2, 1911. There is manifestly an error either in the instrument of assignment or in the certificate as to the date of its recording. One of the publications of "Cement" in the Journal was on March 12, 1911, and the other May 12, 1911. The first of these publications is eliminated from consideration.

By Section 3 of the Copyright Act, a copyright protects all of the copyrightable component parts of the thing copyrighted, etc. The several parts are protected when severed, if properly marked. Each map, for instance, in a statistical atlas need not be separately copyrighted, but all are protected by a copyright of the work. Black v. Allen Co., 42 Fed. Rep., 618; Lydiard-Peterson Co. v. Woodman, 204 Fed. Rep., 921, C. C. A. 8. Pictorial illustrations, such as are under consideration here, fall within the same rule as maps in a statistical atlas.

A copyright is the subject of assignment or grant. Sec. 42, Copyright Act. The former act merely provided for an assignment. Sec. 4955, Rev. Stat.; 9 Cyc. 931, et seq. The present act is by its terms somewhat broader than the former one. An assignment carries the entire title. Under the former law, even a license might be

given conferring merely the privilege of publication, but it passed no proprietary interest. 9 Cyc. 934; American Press Association v. Daily Story Pub. Co., 120 Fed. Rep., 766, 768, C. C. A. 7; Black v. Allen & Co., 42 Fed. Rep., 618, also 56 Fed. Rep., 764. That a license may be granted is at least impliedly recognized in American Tobacco Co. v. Werckmeister, 207 U. S., 284, 297. A license may be granted under the present act. Aeolian Co. v. Royal Music Roll Co., 196 Fed. Rep., 926. The Morehouse-Martens Company had a license, but not a proprietary interest. The plaintiff in each case is seeking to recover only its own damages. It cannot recover on the present state of the pleadings for the Morehouse-Martens Company, Brookfield v. Novelty Glass Mfg. Co., 170 Fed. Rep., 960, C. C. A. 3, but may recover for itself. The Morehouse-Martens Com-
26 pany is not asking anything. At the opening of the trial leave was asked to file an amendment to the answer in each case, ruling on which was withheld. Considering the state of the evidence, I think the leave should be refused.

The notice obtained from the printed sheet which was posted in the store of the Morehouse-Martins Company was sufficient to apprise the respective defendants of prior infringing publications, but it related only to such. The rule stated in Booker v. Booker, 100 Am. St. Rep., 250, 257, 258 (208 Ill., 529, 541, 542), controls. Haig saw the notice about November 6, 1911. The sheet was published about that time, perhaps a couple of days prior. Excepting one publication appearing in the Dispatch on November 10, 1911, there was no subsequent picture in either of the papers.

The provisions in Section 20, relating to the omission by accident or mistake of the prescribed notice from a particular copy of a copyrighted article must be construed to mean an omission by the copyright proprietor and not an omission by a licensee. American Press Ass'on v. Daily Story Pub. Co., 120 Fed. Rep., 766, C. C. A. 7; Press Pub. Co. v. Falk, 59 Fed. Rep., 324, Falk v. Gast Lith. & Eng. Co., 54 Fed. Rep., 890 C. C. A. 2; Bowker on Copyrights, 236, citing Green v. Irish Independence, 1 Ir. Rep., 386 (1899).

The rule of damages is stated in Section 25 of the Copyright Act. An infringer is liable to pay the copyright proprietor (*a*) such damages as he may have suffered on account of the infringement, and the profits the infringer has made, or (*b*), in lieu of actual damages and of profits, such damages as the court may deem just, and in allowing such damages it may in its discretion allow the following amounts: (*b*-1) in case of a newspaper reproduction of a copyrighted photograph the sum shall not be less than $50 nor more than $250, and (*b*-2) in all other cases the damages shall not be less than $250 nor more than $5000. Under the above subdivision (*b*), the damages which a court may in its discretion allow may be $1 for every infringing copy made or sold or found in the possession of the infringer, his agents or employes. It thus appears that a court may allow damages as stated in the above subdivision (*a*) or, in lieu thereof, as stated in subdivision (*b*), judicial discretion being vested in it. That the above is the correct interpretation of the section appears from Mail & Express Co. v. Life Pub. Co., 192 Fed. Rep., 899,

C. C. A. 2. That was a case of a newspaper reproduction. The trial judge directed the jury to find for the plaintiff, if at all $250 for each infringement. Judge Noyes said:

27 "It is evident that he (the trial judge) considered that the case was one in which an award of actual damages proven would not have been just and if he had himself fixed the damages under the statute he could not have awarded less than the minimum amount."

There is thus a recognition of the two methods of fixing damages. In that case, actual damages were proved. The trial judge might have allowed the actual damages so proved, but believing such allowance would not be just, in the exercise of his discretion and believing that they ought to have as much as $250 for each infringement, he so directed the jury to find. The Appellate Court so interpreted his conduct and found no abuse of discretion. Had he believed the actual damages proved sufficient to compensate the complaining party, he clearly could have allowed them, even though they had been less than $250 for each infringement. Another interpretation of the section, in harmony with the foregoing, is found in Woodman v. Lydiard-Peterson Co., 192 Fed. Rep., 67, 70, 71. The same case as reported by the Court of Appeals of the eighth circuit is found in 204 Fed. Rep., 921. Counsel in that case were evidently satisfied with the trial court's construction of Sec. 25, because they did not make it the basis of error. See also Bowker on Copyrights, 245. In the present case, no actual damages are proved, nor is there any evidence that the defendant in either case made a profit. Therefore neither actual damages nor profits enter into this case. The law is not to be used oppressively. There is no evidence on which other than nominal damages can be based. A property right having been invaded, damages of that character should be awarded. Besuden v. Com'rs, 7 Ohio C. C., 237, 239; Bank v Telegraph Co., 30 Ohio St., 555, 568; but they are restricted to a small sum. Besuden v. Com'rs, p. 239. The pictorial illustrations in question show fashions for a single season. Their value is apparently short lived and lies mostly in their use for display or advertising purposes. There were seven occasions of publication by the Dispatch Printing Company and a like number by the Ohio State Journal Company,—one of its publications being eliminated as hereinbefore stated. Infringement is a question of fact rather than of intent and it is not a valid defense that the infringer was ignorant that the thing published had been copyrighted. The absence of guilty knowledge or intent goes in mitigation of punitive damages, Bowker on Copyrights, 252, 253; but punitive damages are out of the question because actual and compensatory damages were not proved. The contrary of

28 the above view as to ignorance that a published illustration has been copyrighted is found in Bolton v. London Exhibition (1898), 14 T. L. R., 550. Guilty knowledge and intent are absent in both of the present cases. Each of the defendants exercised reasonable care to avoid intrenching on the rights of copyright holders, excepting that it would seem in one, and possibly another publication the Dispatch Printing Company should have taken notice

that a pictorial illustration noted as copyrighted appeared in the Morehouse-Martins Company advertisement and should not therefore have published it in another person's advertisement. Considering the modern methods of merchants and newspaper publishers regarding advertising matter, it would be remarkable if occasional cases of wrongful publication would not arise. However viewed, the ends of justice do not require judgment in either of the cases for more than a nominal sum. Indeed the plaintiff cannot be said to have attempted to prove more. Considering that there were seven different dates of publication in each paper, the damages allowed against each of the defendants are fixed in each case at ten dollars ($10) for each publication. That is to say, the total aggregate damages allowed in each case is $70. Costs will follow the judgment in each case. The two above cases having been tried as one, an attorney's fee is allowed to the amount of $50, one-half of which to be taxed in each case. Judge Williard's decision in the Woodman case is quite satisfactory and I am content to follow closely in his footsteps. Injunction may go as to the illustrations named in each bill. An order may be taken accordingly.

Memorandum.

Filed April 29, 1914.

SATER, *District Judge:*

In December, 1912, the parties to the above actions filed a waiver of the right to trial by jury, in accordance with Sections 649
29 and 700, R. S., U. S. In the following month the cases were heard, and on August 4 following an opinion was filed by the court containing general findings of fact, as well as a discussion of the law on every material point. Neither on the filing of the waiver of the right to trial by a jury or at the hearing was any request made for a special finding of fact or a separate finding of fact and conclusions of law. I did not understand there to be any serious contention that the case is one at law and not in equity. Indeed, it can hardly be claimed that the plaintiff entertained any deep seated conviction that the action is one at law, else it would not have filed bills of complaint. Some few weeks ago, within the period in which the court's time was given almost exclusively to the trial of jury cases at Cincinnati, counsel, on account of their inability to agree upon the form of judgment and perhaps a bill of exceptions, presented themselves in open court and the plaintiff asked for what I interpret to be a separate and special finding of fact and conclusion of law. Is it entitled to such?

That the question under consideration is controlled wholly by the federal statute and federal practice is apparent from many adjudications. See annotations to section 700, R. S., found in 4 Fed. Stat. Anno., 450, et seq., and Supplement (1912) Fed. Stat. Anno., 1370, et seq. Under section 649, the findings of fact may be either general or special, but they must be one or the other and not both. British

Queen Min. Co. v. Baker Silver Min. Co., 139 U. S., 222. General findings of fact may be set forth in the opinion of the trial court. Natl. Surety Co. v. Cincinnati, N. O. & T. P. Ry. Co., 145 Fed. Rep., 34, C. C. A. 6. Whether the find-s shall be special or general rests in the discretion of the trial court, Insurance Co. v. Folsom, 18 Wall., 237, 249; nor is the court required to find facts specially even if requested so to do. Berwind-White Coal Min. Co. v. Martin, 124 Fed. Rep., 313, C. C. A. 3.

It follows that the plaintiff is not entitled as a matter of right to a special finding of fact, nor may it have both a general and a special finding. The request for a special finding, or for a separate finding of fact and conclusion of law—whichever the plaintiff intended—is denied.

The request ought to be denied for another reason. More than six months elapsed after the filing of the opinion before the request was made. It has been the uniform policy of this court when a jury has been waived and the case tried to the court, to make, when studying the case, a separate finding of fact and conclusion of law, if then or prior thereto requested. If no such request is made, double work should not be imposed on the court and its time consumed by a restudy of the entire case, on account of a belated request made long after the facts of the case have gone out of the court's mind.

Journal Entry.

Entered April 29, 1914.

Heretofore, to wit, on the fifteenth day of January, 1913, this cause came on to be heard upon the pleadings and the evidence and the same was argued by counsel and the court having taken the same under advisement, and having duly considered the same until the fourth day of August, 1913, the court finds in favor of the plaintiff and against the defendant as to all of the infringements set forth in the bill of complaint and that the plaintiff is entitled to recover against the said defendant upon each of the several causes of action set forth in the plaintiff's bill of complaint, the sum of $10 for and on account of the publications of the matter as therein set forth.

To which finding of the court that complainant is entitled to recover only $10 for each of said infringements, and is not entitled to recover not less than $250 or more than $5000 for each of said infringements the complainant excepts.

It is therefore by the court considered, ordered and adjudged that the plaintiff, L. A. Westermann Company recover from the defendant the sum of $70, together with its costs herein, taxed at $—, and as part of the costs thereof the court doth order and adjudge that the said defendant, The Dispatch Printing Company, pay to the said plaintiff as an attorney fee herein the additional sum of $25, for all of which execution is awarded.

To all which findings and judgment of the court complainant excepts.

The court further finds that the complainant is entitled to an injunction as prayed for in the bill of complaint and it is there-
31 fore considered, ordered and adjudged that the defendant be perpetually enjoined and restrained from printing or in any other way making copies or selling or distributing or publishing copies of the said copyrighted prints and pictorial illustrations of the complainant set forth in its bill of complaint.

Complainant's Motion for New Trial.

Filed April 29, 1914.

Now comes the complainant and moves the court for an order vacating and setting aside its finding and judgment as to the amount of damages due the complainant from the defendant, and for a new trial herein, upon the following grounds, to wit:

1. That the court erred in finding that the plaintiff was entitled to recover only the sum of ten dollars ($10), for and on account of the several causes of action or infringements set forth in the bill of complaint.

2. That the court should have found that the plaintiff was entitled to recover upon each of the said infringements the sum of not more than five thousand dollars ($5000) and not less than two hundred and fifty ($250) dollars.

3. That the said finding of the court as to the amount of which plaintiff is entitled to recover is contrary to law.

4. That the said finding of the court as to the amount of which plaintiff is entitled to recover is contrary to the evidence.

5. That the court should have found that the plaintiff was entitled to recover the sum of not more than five thousand ($5000) dollars and not less than two hundred fifty ($250) dollars upon each of the infringements set forth in the bill of complaint.

6. Other errors apparent upon an inspection of the record.

L. A. WESTERMANN COMPANY,
By WILLIAMS, WILLIAMS, TAYLOR & NASH,
Its Solicitors.

32 *Decree Overruling Motion for New Trial.*

Entered April 30, 1914.

On this thirtieth day of April, 1914, the above matter came on to be heard upon the motion of the defendant praying that the court vacate and set aside its findings as to the amount of damages in this action and for a new trial and after hearing the arguments of counsel for the complainant and the defendant, on consideration thereof.

It is ordered that said motion be and the same is hereby overruled to which order and judgment of the court the complainant at the time excepted and still excepts.

Petition on Appeal.

Filed April 30, 1914.

L. A. Westermann Company, complainant above named, conceiving itself aggrieved by the final decree entered herein on the twenty-ninth day of April, 1914, hereby appeals from the same to the United States Circuit Court of Appeals for the Sixth Circuit and prays that this appeal be allowed and that a transcript of the proceedings and papers in this court, duly authenticated, may be presented to the United States Circuit Court of Appeals for the Sixth Circuit.

L. A. WESTERMANN COMPANY,
By C. C. WILLIAMS,
H. A. WILLIAMS,
E. L. TAYLOR, JR., and
SIMEON NASH, *Its Attorneys.*

The foregoing petition on appeal is hereby allowed this thirtieth day of April, 1914.

J. E. SATER,
District Judge.

33 *Assignment of Errors.*

Filed April 30, 1914.

Now comes L. A. Westermann Company complainant and presents with the accompanying petition on appeal from the final decree rendered herein on the 29th day of April, 1914, the following assignment of errors:

1. That the said District Court erred in its finding that the complainant was entitled to recover from the defendant damages only in the sum of ten ($10) dollars for each of the infringements complained of in the bill of complaint.

2. That the said finding is contrary to the evidence.

3. That the said finding is contrary to law, and contrary to the provisions of section 25 of the Act of Congress of March 4th, 1909, 35 Stat. L., 1075.

4. That the court erred in its conclusion of law that the provisions of section 25 of the Act of Congress of March 4th, 1909, 35 Stat. L., 1075, did not require the court in said action to award not less than two hundred and fifty ($250) dollars for each of the infringements complained of in the bill of complaint.

5. That the court should have found as a matter of law that it was required to award as damages due the complainant from the defendant the sum of not less than two hundred and fifty ($250) dollars or more than five thousand ($5000) dollars for each of the infringements complained of in the bill of complaint.

6. That the court should have awarded damages in favor of the

complainant against the defendant in the sum of five thousand ($5000) dollars for each infringement, complained of in the bill of complaint, a total of thirty-five thousand ($35,000) dollars.

7. That the court erred in finding that the damages due the complainant from the defendant for each infringement was only the sum of ten ($10) dollars for each infringement whereas it should have found that the damages due the complainant from the defendant for each infringement was the sum of five thousand ($5000) dollars for each infringement.

8. The court erred in each and all of its reasons given in its opinion for the construction of section 25 of the said Act of Congress of March 4th, 1909, 35 Stat. L., 1075, which was adopted and applied by the court.

9. Said court erred in decreeing that the complainant should recover from the defendant only the total sum of seventy ($70) dollars for all of the infringements complained of in the bill of complaint whereas it should have decreed that the complainant recover the total sum of thirty-five thousand ($35,000) dollars for all of the infringements complained of in the bill of complaint.

34 10. That the court erred in overruling the motion of the complainant for a new trial filed in said cause on the 29th day of April, 1914.

11. Other plain errors apparent upon an inspection of the record.

L. A. WESTERMANN COMPANY,
By C. C. WILLIAMS,
H. A. WILLIAMS,
E. L. TAYLOR, JR., AND
SIMEON NASH, *Its Solicitors.*

Complainant's Appeal Bond.

Filed April 30, 1914.

Know all men by these presents:

That we, L. A. Westermann Company as principal and Fidelity and Deposit Company of Maryland as surety, are held and firmly bound unto The Dispatch Printing Company in the full and just sum of three hundred dollars to be paid to the said The Dispatch Printing Company, its heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of April in the year of our Lord one thousand, nine hundred and fourteen (1914).

Whereas lately at a session of the United States District Court for the Southern District of Ohio, Eastern Division, in a certain suit depending in said court between the said L. A. Westermann Company, complainant and The Dispatch Printing Company, defendant, a decree was entered in favor of said complainant against said de-

fendant, but said complainant complains that said court
35 erred in its certain findings therein as to the amount of damages due the plaintiff from the said defendant, and

Whereas the said L. A. Westermann Company, complainant, is about to obtain an order allowing an appeal from said decree to the United States Circuit Court of Appeals for the Sixth Circuit to reverse said decree and a citation directed to said The Dispatch Printing Company citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Sixth Circuit to be holden at Cincinnati, Ohio, in said circuit on the — day of ——, 1914.

Now, the condition of the above application is such and if the said L. A. Westermann Company shall prosecute its appeal to effect, and shall answer all costs and damages that may be awarded against it if it fails to make this appeal good, then the above obligation shall be void; else to remain in full force and virtue in law

L. A. WESTERMANN COMPANY,
By SIMEON NASH, *Its Attorney.*
FIDELITY AND DEPOSIT CO. OF MARYLAND,
By ARTHUR D. MURPHY, *Attorney in Fact.*

Signed and delivered in the presence of,
A. M. SPARKS.

Approved:
J. E. SATER,
District Judge.

Citation.

Filed May 2, 1914.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

United States Circuit Court of Appeals for the Sixth Circuit.

To The Dispatch Printing Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the
36 Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the twenty-ninth day of May next, pursuant to a petition for appeal, filed in the clerk's office of the District Court of the United States for the Southern District of Ohio, Eastern Division, wherein L. A. Westermann Company, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this thirtieth day of April, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America the one hundred and thirty-eighth.

J. E. SATER,
U. S. District Judge, S. D. O.

Columbus, Ohio, May 1, 1914.

Service of the within citation on appeal is hereby acknowledged this first day of May, A. D. 1914.

THE DISPATCH PRINTING COMPANY.
By SMITH W. BENNETT, *Its Solicitor.*

Petition for a Writ of Error.

Filed April 30, 1914.

To the Honorable John E. Sater, Judge of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Now comes the complainant and says that on or about the twenty-ninth day of April, 1914, this court rendered a judgment and decree in favor of this complainant and against the defendant for the sum of seventy ($70) dollars damages and twenty-five
37 ($25) dollars attorney's fees among other things, and afterwards, to wit: On or about the thirtieth day of April, 1914, overruled the motion of this plaintiff to set aside and vacate the findings of said court as to the amount of damages due the plaintiff from the defendant, and for a new trial, which said motion was filed in this court on the twenty-ninth day of April, 1914, and this complainant states that in said judgment and proceedings had in said cause, certain errors were committed to the prejudice of this complainant, all of which more in detail will appear from the assignment of errors which is filed with this petition.

Wherefore, this complainant prays that a writ of error may issue in this behalf of the United States Circuit Court of Appeals of the Sixth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals, and complainant prays for such other orders as may be proper in the premises.

L. A. WESTERMANN COMPANY,
By C. C. WILLIAMS,
H. A. WILLIAMS,
E. L. TAYLOR, JR., AND
SIMEON NASH,
Its Attorneys and Solicitors.

Assignment of Errors in Proceeding in Error.

Filed April 30, 1914.

Now comes L. A. Westermann Company, complainant, and presents with the accompanying petition in error from the final decree rendered herein on the twenty-ninth day of April, 1914, the following assignment of errors:

1. That the said District Court erred in its finding that the complainant was entitled to recover from the defendant damages only in the sum of ten ($10) dollars for each of the infringe-
38 ments complained of in the bill of complaint.

2. That the said finding is contrary to the evidence.

3. That the said finding is contrary to law, and contrary to the provisions of section 25 of the Act of Congress of March 4, 1909, 35 Stat. L., 1075.

4. That the court erred in its conclusion of law that the provisions of section 25 of the Act of Congress of March 4, 1909, 35 Stat. L., 1075 did not require the court in said action to award not less than two hundred and fifty ($250) dollars for each of the infringements complained of in the bill of complaint.

5. That the court should have found as a matter of law that it was required to award as damages due the complainant from the defendant the sum of not less than two hundred and fifty ($250) dollars or more than five thousand ($5000) dollars for each of the infringements complained of in the bill of complaint.

6. That the court should have awarded damages in favor of the complainant against the defendant in the sum of five thousand ($5000) dollars for each infringement, complained of in the bill of complaint, a total of thirty-five thousand ($35,000) dollars.

7. That the court erred in finding that the damages due the complainant from the defendant for each infringement was only the sum of ten ($10) dollars for each infringement whereas it should have found that the damages due the complainant from the defendant for each infringement was the sum of five thousand ($5000) dollars for each infringement.

8. The court erred in each and all of its reasons given in its opinion for the construction of section 25 of the said Act of Congress of March 4, 1909, 35 Stat. L., 1075, which was adopted and applied by said court.

9. Said court erred in decreeing that the complainant should recover from the defendant only the total sum of seventy ($70) dollars for all of the infringements complained of in the bill of complainant whereas it should have decreed that the complainant recover the total sum of thirty-five thousand ($35,000) dollars for all of the infringements complained of in the bill of complaint.

10. That the court erred in overruling the motion of the complainant for a new trial filed in said cause on the twenty-ninth day of April, 1914.

39 11. Other plain errors apparent upon an inspection of the record.

L. A. WESTERMANN COMPANY,
By C. C. WILLIAMS,
H. A. WILLIAMS,
E. L. TAYLOR, JR., AND
SIMEON NASH,
Its Solicitors.

Order Granting Writ of Error.

Filed April 30, 1914.

This day came the complainant herein by its attorneys and filed herein and presented to the courts its petition for the allowance of a writ of error and an assignment of errors intended to be urged by him, said petition praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals of the Sixth Circuit, and that such other and further proceedings may be had as may be proper in the premises; on consideration whereof the court does allow the writ of error which the plaintiff prays for in his said petition, and it being made further to appear to the court that the said complainant intends to prosecute said writ of error, it is further ordered upon application of the complainant that the complainant enter into an undertaking with good and sufficient surety in the sum of three hundred dollars, which said bond has been given to the satisfaction of the court, that the complainant, as complainant in error shall prosecute its writ of error to effect, and if it fail to make its writ good may answer all costs made in said action, and all damages which may be awarded therein.

40 *Complainant's Bond in Error Proceedings.*

Filed April 30, 1914.

Know all men by these presents:

That we, L. A. Westermann Company as principal, and Fidelity and Deposit Company of Maryland, as surety are held and firmly bound unto The Dispatch Printing Company in the full and just sum of three hundred dollars to be paid to the said The Dispatch Printing Company, and its certain attorneys, executors, administrators and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of April, A. D. 1914, at Columbus, Ohio.

Whereas lately at a term of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a certain

suit depending in said court between said L. A. Westermann Company as complainant and said The Dispatch Printing Company as defendant, a certain judgment was rendered in favor of the said the L. A. Westermann Company against the said defendant, The Dispatch Printing Company, but said L. A. Westermann Company complains of certain alleged errors of the court in the said judgment in refusing to allow the amount of damages prayed for by said complainant and the said L. A. Westermann Company having sued for and obtained a writ of error in the Circuit Court of Appeals of the Sixth Circuit, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the said action, and having obtained a citation directed to the said The Dispatch Printing C-mpany citing and adm-nishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the city of Cincinnati, Ohio, in the said Circuit Court on the — day of ——, 1914.

Now the condition of this obligation is such that if the said L. A. Westermann Company shall, as complainant in error, prosecute its writ of error to effect, and if it fail to make the same good, shall answer all costs made in said proceedings and all damages which may be awarded against it therein, and otherwise do and perform the orders of the court, then the above obligation shall be void else to remain in full force and virtue in law.

L. A. WESTERMANN COMPANY,
By SIMEON NASH, *Its Attorney.*
FIDELITY AND DEPOSIT COMPANY OF MD.,
By ARTHUR D. MURPHY,
Attorney in Fact.

Signed and delivered in the presence of:
A. M. SPARKS.

41 Approved:
J. E. SATER,
District Judge.

Citation.

Filed May 2, 1914.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

United States Circuit Court of Appeals for the Sixth Circuit to The Dispatch Printing Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the twenty-

ninth day of May, next, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Southern District of Ohio, Eastern Division, wherein L. A. Westermann Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, chief justice of the United States, this 30th day of April, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America the one hundred and thirty-eighth.

J. E. SATER,
U. S. District Judge, S. D. O.

Columbus, Ohio,
May 1st, 1914.

Service of the within citation on error is hereby acknowledged this 1st day of May, A. D. 1914.

THE DISPATCH PRINTING COMPANY,
By SMITH W. BENNETT, *Its Solicitor.*

42 *Writ of Error.*

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

United States Circuit Court of Appeals for the Sixth Circuit.

The President of the United States to the Honorable the Judge of the District Court of the United States for the Southern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between L. A. Westermann Company and The Dispatch Printing Company, a manifest error hath happened, to the great damage of the said L. A. Westermann Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the 29th day of May next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals

may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, chief justice of the United States, the 30th day of April, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America the one hundred and thirty-eighth.

B. E. DILLEY,
Clerk of the District Court of the United States,
Southern District of Ohio.

[SEAL.] By C. P. WHITE, JR., *Deputy.*

Allowed by
J. E. SATER,
U. S. District Judge, S. D. O.

43 *Notice and Proof of Service.*

Filed May 2, 1914.

To the Defendant above named:

You are hereby notified that the complainant above named has filed in the office of the clerk of the District Court of the United States, Southern District of Ohio, Eastern Division, its bill of exceptions and statement of the evidence on appeal, in the above entitled action, and that the same will be presented to his Honor, J. E. Sater, Judge of the District Court of the United States, at the United States Court room, Federal Building, Columbus, Ohio, in said district, on Monday, the 11th day of May, 1914, at 10 A. M. and then and there will ask said judge to allow, settle, and sign the same.

L. A. WESTERMANN COMPANY,
By C. C. WILLIAMS,
E. L. TAYLOR, JR.,
H. A. WILLIAMS,
SIMEON NASH,
Its Solicitors.

Dated Columbus, Ohio, May 1st, 1914.

Acknowledgment of Service.

Service of the above notice is hereby acknowledged this 1st day of May, A. D. 1914.

THE DISPATCH PRINTING COMPANY,
By SMITH W. BENNETT, *Its Solicitor.*

Order.

Entered May 11, 1914.

Upon application of complainant and for good cause shown the return days of the citations on appeal and error herein are extended thirty days, to wit, until June 28th 1914.

44 *Notice.*

Filed May 25, 1914.

To the Defendant Above*d* Named:

You are hereby notified that the plaintiff, in accordance with the rules of the Circuit Court of Appeals, has prepared a condensed statement of the testimony and bill of exceptions in the above case, which has this day been lodged in the office of the clerk of Circuit Court, and that the same will be presented to his Honor, J. E. Sater, judge of the District Court of the United States, on Monday, May 11th, 1914, at 10:00 o'clock A. M., as a substitute for the statement of the evidence and bill of exceptions, heretofore lodged with said clerk, of which you have heretofore been notified.

A carbon copy of said condensed statement of the evidence and bill of exceptions is handed you herewith. The original exhibits are to be attached to said statement and bill of exceptions as indicated.

WILLIAMS, WILLIAMS, TAYLOR & NASH,
Solicitors for Complainant.

Service of the above notice is acknowledged this 5th day of May, A. D. 1914.

SMITH W. BENNETT,
Solicitor for Defendant.

Memorandum.

Filed May 25, 1914.

SATER, *District Judge:*

The witness Parsons testified that he wrote a letter to the Dispatch Printing Company and another to the Ohio State Journal regarding the publication of the copyrighted matter. Plaintiff insists that the evidence as to the letter to the Journal should be incorporated in the present record. The two cases were much alike and were tried together, but they are separate cases in which separate judgments were rendered and which must go separately to a higher court.

L. & N. R. Co. v. Summers, 125 Fed. Rep., 719, C. C. A. 6.

45 The evidence in the case against the Dispatch Printing Company fails to show that the letter which Parsons says he wrote

to it was either mailed or received. There is thus no foundation laid for inserting in this record the evidence as to the other letter alleged to have been sent to the Journal. Other contentions made need not be considered.

Statement of the Evidence and Bill of Exceptions.

Filed May 25, 1914.

Present:

C. C. Williams, Simeon Nash, and R. M. Lucas, on behalf of plaintiff.

Smith W. Bennett, on behalf of defendant.

Be it remembered: That on the trial of the above entitled cause in the above named court, before the Honorable John E. Sater, District Judge, sitting at Columbus, Ohio, commencing on the fifteenth day of January, A. D. 1913, the plaintiff to maintain the issues on its part to be maintained offered and introduced the following evidence, to wit:

And thereupon counsel for the plaintiff and the defendant stated the case to the court, and it was thereupon stipulated and agreed by and between the plaintiff and defendant through their counsel, for the purpose of this case, that the allegations of the bill of complaint, as to the circulation of the defendant's newspaper, is true and correct, and that the circulation of said paper on the dates stated in the complaint was and is as stated therein; and also that the allegations of the bill of complaint as to the corporate existence of the plaintiff and defendant are true and correct.

The complainant thereupon called LEWIS AUREL WESTER-
46 MANN, as a witness, who being first duly sworn, testified as follows:

He stated that his residence was Scarsdale, New York, and that he was the president of the complainant, and had been such president for three years last past; that the L. A. Westermann Company is engaged in the business of furnishing so-called newspaper syndicate service to department stores, consisting of illustrations to be used in their advertising; that Mrs. Westermann at the beginning of the fashion season looks over the styles of garments and selecting the styles which she thinks best for advertising, makes illustrations thereof; from these illustrations engravings are made and these engravings are then printed a number on a sheet in a convenient way to show the same; that these sheets are then sent to customers; that these illustrations are made by Mrs. Westermann someti-es in pen and ink and sometimes in crayon; that Mrs. Westermann is employed by the complainant for this purpose.

The witness thereupon produced certain drawings marked Exhibit "B-1," "B-2," "E-1," "A-1 Dispatch case," "C-1 Dispatch case," and testified that these were original drawings made by Mrs. Westermann, from which such copyright illustrations had after-

wards been made; that said Exhibit "B-1" and "B-2" were the original drawings from which the pictorial print and illustration entitled "Irene," hereinafter referred to, was made; that the Exhibit marked "E-1" was the original drawing from which the pictorial print and illustration entitled "Jury," hereinafter referred to, was made; that the said Exhibit "A-1 Dispatch case" was the original drawing from which the pictorial print and illustration entitled "Intrigue," hereinafter referred to, was made; that the said Exhibit "C-1 Dispatch case" was the original drawing from which the pictorial print and illustration entitled "Impact," hereinafter referred to, was made.

Thereupon the complainant offered Exhibits "B-1" and "B-2," "E-1," "A-1 Dispatch case" and "C-1 Dispatch case" in evidence, to which defendant objected, objection overruled, defendant excepts, and the same was thereupon received in evidence and are attached hereto and marked Exhibits "B-1" and "B-2," "E-1," "A-1 Dispatch case" and "C-1 Dispatch case" and made a part hereof, and the same being too large to be physically attached hereto, they are by agreement submitted herewith with the same effect as if physically attached hereto.

The witness further testified that when each sheet was ready for distribution more than twelve hundred copies of the same
47 would be mailed by L. A. Westermann Company to customers and prospective customers, and that on the same date two copies of each particular illustration would be mailed, together with an application for copyright on the printed form furnished by the register of copyrights to the register of copyrights at Washington, D. C., and that in due course of mail L. A. Westermann Company would receive from the register of copyrights a certificate of ~~the same~~.

The witness testified that this was what had been done by L. A. Westermann Company in the case of each of the following copyright prints and pictorial illustrations, to wit:

Intrigue.
Irene.
Impact.
Hake.
Hack.
Jury.

Thereupon the witness produced the original prints of the different copyright illustrations just named, which he testified were produced and printed under the method above testified to, and which were marked for identification as follows:

Pictorial cut or illustration "Intrigue" Exhibit A Dispatch case."
Pictorial cut or illustration "Irene" Exhibit "B."
Pictorial cut or illustration "Impact" Exhibit "C Dispatch case."
Pictorial cut or illustration "Hake" Exhibit "C."
Pictorial cut or illustration "Hack" Exhibit "D."
Pictorial cut or illustration "Jury" Exhibit "E."

And thereupon said exhibits "A Dispatch case," "B," "C Dispatch case," "C," "D," and "E" were offered in evidence, by the complainant, to which defendant objected; objection overruled; defendant

excepted and the same were thereupon received in evidence on behalf of the complainant, and are hereto attached and marked respectively Exhibits "A Dispatch case," "B," "C Dispatch case," "C," "D" and "E," and attached hereto made a part hereof.

And thereupon the witness produced certain papers, purporting to be certificates of the copyright registration of each of the prints or pictorial illustrations last named, which said papers the witness testified were received by the L. A. Westermann Company in due course of mail from the register of copyrights after the forwarding of the respective applications for copyright as hereinbefore
48 stated, and the said papers were thereupon marked for purposes of identification as follows:

Certificate of copyright registration for "Intrigue" Exhibit "A-3 Dispatch case."

Certificate of copyright registration for "Irene" Exhibit "B-3."

Certificate of copyright registration for "Impact" Exhibit "C-3 Dispatch case."

Certificate of copyright registration for "Hake" Exhibit "C-3."

Certificate of copyright registration for "Hack" Exhibit "D-3."

Certificate of copyright registration for "Jury" Exhibit "E-3."

And thereupon the plaintiff offered in evidence the said exhibits "A-3 Dispatch case," "B-3," "C-3 Dispatch case," "C-3," "D-3," and "E-3" to which defendant objected; objection overruled; defendant excepted; and the same were thereupon received in evidence and respectively marked Exhibits "A-3 Dispatch case," "B-3," "C-3 Dispatch case," "C-3," "D-3," and "A-3," and attached hereto and make a part hereof.

The witness further stated that the dates shown on the respective Exhibits "A Dispatch case," "B," "C Dispatch case," "C," "D," and "E" were the approximate dates upon which the sheets were mailed to customers; that in some instances the sheets may have been mailed a few days in advance of the date appearing thereon.

The witness further testified that after the original drawings were made the proper copyright notice was pasted upon the drawing, and this drawing sent to the engraver for the preparation of the plate, and that the witness examined all of the proofs and the plates to see that the proper copyright notice was affixed thereto, the copyright notice being affixed to each particular cut; that a number of cuts would then be arranged by the witness for printing the same on one page; that this was true of each and all of the prints and pictorial illustrations referred to in the bill of complaint; that each of the particular prints which appeared on said sheets would be mailed to the register of copyrights separately for separate registration, and that in no case would any sheet be sent in for registration as a whole, and that this was true of each and all of the copyright prints and illustrations referred to in the bill of complaint. The witness further testified that the original drawings for all of the prints and pictorial illustrations mentioned in the bill of complaint, with the exception of "Irene," "Jury," "Intrigue" and "Impact," which are in-
49 troduced in evidence, were destroyed along in January, 1912, when the complainant's offices were moved.

The witness testified that at no time had he or any other officer of the complainant, or the complainant, given the defendant the right to use any of the several copyright prints and pictorial illustrations referred to in the bill of complaint, and that during all of the times mentioned in the bill of complaint the complainant was the owner of the copyright in said prints and pictorial illustrations, mentioned in the bill of complaint.

The witness further testified that he had read over the bill of complaint and that the dates of publication stated in the bill of complaint for the several copyright prints and illustrations therein referred to, are correct.

The witness then testified that either by mail or by calls in person he made arrangements with his customers for the use of the illustrations furnished by the complainant; that in no case had the complainant ever authorized its customer to sell to their competitor or to other persons, the right to use the copyright prints; that in every case the complainant retained the ownership of the copyright in the illustrations; that this was true of each and all of the copyright illustrations referred to in the bill of complaint; that the complainant had never published or issued any copy of the copyright prints referred to in the bill of complaint without the copyright notice affixed thereto, as shown upon the prints of same introduced in evidence.

The witness further stated that every sheet of illustrations sent out by the complainant to any one, or published by it in any manner, contained thereon the wording which appears upon the sheet marked Exhibit "B" which reads as follows:

"In ordering separate mats be sure and state whether you wish Size A, Size B, or both. All of our drawings are copyrighted under the copyright law enacted March 4th, 1909. That we may protect our customers and ourselves, we deliver the mats or electros with the understanding that they will not be used without our copyright notice. We will appreciate it if our attention is called to any of these drawings, as we will prosecute any infringement that comes to our notice. L. A. Westermann Company, 41 Union Square, New York."

The witness further testified that the complainant had never published any of the copyright prints referred to in the bill of complaint in any other form than on the sheets which are in evidence; that the complainant had never given any person any authority to use any of the copyright prints without the copyright mark thereon.

50 And thereupon counsel for the respective parties entered into the following stipulation:

"That the exhibits attached to the bill of complaint in the case against The Dispatch Printing Company, No. 1649, are each and all portions of the respective papers published by this company, as of the dates they purport to have been published; but this admission does not cover the genuineness of the illustrations, nor does it waive any proof that such illustrations as are contained in the papers or exhibits attached to the respective bills of complaint are any of the illustrations copyrighted by the complainant."

Thereupon the witness testified that he had been in the business

of marketing such pictorial illustrations for fifteen years altogether, and in his own business for nine years and that by reason of his experience he was able to identify such pictorial illustrations, and thereupon it was stipulated by counsel as follows:

"It is stipulated that the witness will testify as an expert that each of the pictures purporting to be or claimed to be an infringement and attached as an exhibit to the complaint, and shown or purported to be shown in the Dispatch as of the several dates indicated, is in fact a copy of the particular copyright as pleaded in the complaint or of parts thereof where the picture is but one of a group of more than one."

Thereupon counsel for complainant produced a copy of the Columbus Evening Dispatch for September 19, 1911, which was marked for identification Exhibit "CC-3 Dispatch case," and thereupon it was stipulated by counsel that the newspaper marked Exhibit "CC-3 Dispatch case" is in fact a copy of such paper for Tuesday, September 19, 1911.

And thereupon said Exhibit "CC-3 Dispatch case" was offered in evidence on behalf of the complainant and was received in evidence and is attached hereto and marked Exhibit "CC-3 Dispatch case" and made a part hereof.

And thereupon the witness testified upon examination of the respective prints that the illustration on the ninth page of Exhibit "CC-3 Dispatch case" at the lower left hand corner of the ad of the Morehouse-Martens Company in said paper, was the same print which is attached to the bill of complaint and marked Exhibit "C." The witness further testified that the respective prints found in the copies of the copyright prints attached to the bill of complaint in this case and the illustrations herein identified and offered in evidence, are in the respective cases the same prints, and illustrations.

51 Thereupon the complainant produced a paper which was marked for identification as Exhibit "F-1 Dispatch case," and thereupon it was stipulated by counsel that said Exhibit "F-1 Dispatch case" was in fact a copy of the Columbus Sunday Dispatch, a newspaper published by the defendant, for Sunday, October 15, 1911.

And thereupon the complainant offered in evidence said Exhibit "F-1 Dispatch case" and the same was received in evidence and is hereto attached and marked "Exhibit F-1 Dispatch case" and made a part hereof.

And thereupon the witness testified upon examination of the respective papers, that the illustration near the top of the ad of Morehouse-Martens Company in said Exhibit "F-1 Dispatch case," is the same illustration as that attached to the bill of complaint as Exhibit "FF."

Thereupon the complainant produced a paper which was marked for purposes of identification as Exhibit "G" and the witness testified that said Exhibit "G" was published by L. A. Westermann Company and that a copy thereof was sent to the Morehouse-Martens Company;

that Exhibit "G" was issued on November 4, 1911 and sent to the Morehouse-Martens Company on that date.

The following questions were then asked and answers given, to wit:

Q. You may state, Mr. Westermann, whether or not you have had complaints of infringement of these copyrights?

A. I have.

Q. Is it possible for you to measure in dollars and cents, or in money, the damage you have sustained by reason of these infringements of copyrights?

A. No.

Mr. Bennett: I object.

The Court: I will let the answer stand.

To which ruling counsel for defendants excepted.

Q. Why?

Question objected to by counsel for defendants; objection overruled; exception by defendants.

A. Because the cost of publication cannot—because it cannot be proportioned in respect to single illustrations.

Cross-examination.

By Mr. Bennett:

Q. Mr. Westermann, in speaking of the amount of the compensation, I mean, the amount of the damage which the complainant has sustained, you say you are unable to give that, and you have given reasons why you are unable to compute that; do I understand you correctly?

A. Yes, sir.

52 Thereupon the witness testified further upon cross-examination as follows: That at the times of these several infringements the complainant had a contract with the Morehouse-Martens Company of Columbus, Ohio, under which the Morehouse-Martens Company received the sheets of illustrations sent out by the complainant, and then paid the complainant for the use of such particular illustrations as the Morehouse-Martens Company actually used; that this was the contract between complainant and the Morehouse-Martens Company when the Morehouse-Martens Company first took the Westermann service; that this contract existed during 1911 and that some time in 1912 a new contract was made under which the Morehouse-Martens Company paid a specified amount and then had the right to the use of any and all of the illustrations furnished on these sheets which it might desire to use; that under both of these contracts the Morehouse-Martens Company had the exclusive right to the use of these illustrations in the city of Columbus, Ohio, but that the complainant reserved the right to furnish the same illustrations to such other customers outside of the city of Columbus, Ohio, as it might desire; that the same Westermann service had been furnished during these times in Cleveland, Ohio, to the Morehouse Company,

in Toledo, Ohio, to the Lyon Dry Goods Company, and in Dayton, Ohio, to the Riker-Kumler Company, and in several other cities in Ohio, to other customers whose names the witness could not remember just at the time; that in each of these cases the customer received the exclusive right to the use of the Westermann copyright illustrations within their respective cities; that the complainant was incorporated about September, 1905; that some of these agreements with customers were made by correspondence and some by personal calls; that in the reproduction of the original prints and the preparation of the cuts thereof, a photographic process is used; that in this process what is called a matrix is made and that these matrices are made by a company in New York employed by the complainant for that purpose, viz, The Rubens Electro Company.

Thereupon the complainant called as a witness on its behalf, Edward Roy Parsons, who, being first duly sworn, testified as follows:

Examined by Judge Williams:

That from May, 1909, until the summer of 1911 he was the manager of the advertising department of Morehouse-Martens Company and that as such it was his duty to prepare the newspaper ad-
53 vertising and other advertising for said company, make contracts and transact all business relative to the advertising of said company; that he is acquainted with L. A. Westermann and the L. A. Westermann Company and that on behalf of the Morehouse-Martens Company he at one time obtained the service of the complainant; that the arrangements for this service were made early in the spring of 1911 at which time Mr. Westermann was in Columbus, and made the arrangements with Mr. Parsons in person; that this was before March, 1911; that under this arrangement the Morehouse-Martens Company was given the exclusive right to the use of these illustrations in Columbus, said company to pay for the same as they were used; that this arrangement was to continue for a year; that at the end of that time the arrangement was renewed verbally at a conference between the witness and Mr. Westermann in New York, and a conference shortly thereafter between the witness and Mr. Westermann in Columbus, these conferences being early in 1912; that during the original contract made in 1911 the Morehouse-Martens Company accounted each month for the illustrations which it used during the month, memorandum being forwarded to the Westermann Company as the same were used; that the witness left the employment of the Morehouse-Martens Company, November 10, 1912; that by the term "exclusive use" contained in the witness' statement of said contracts, he meant that the Morehouse-Martens Company was the only concern in the city of Columbus, Ohio, which was allowed to use the Westermann illustrations; that when the first contract was made which the witness states was about January, 1911, Mr. Westermann stated to him that the illustrations were copyrighted and that the Morehouse-Martens Company were given the exclusive right to use them in Columbus, Ohio, and that no one else would be permitted to use them in Columbus, Ohio, and that the complainant would protect the Morehouse-Mar-

tens Company against such use; that under these two contracts the Morehouse-Martens Company did not have the right to grant permission to any other merchant in the city of Columbus, Ohio, to use these illustrations; that Mr. Westermann at the time of making these respective contracts said that he would prosecute any infringements upon the right to use the illustrations; that on neither of the occasion of the making of said two contracts or on any other occasion, did the complainant sell, assign or transfer to the Morehouse-Martens Company the copyright of any of the Westermann illustrations; that at no time did the complainant give the Morehouse-Martens Com-
54 pany anything else than the mere privilege of using the illustrations during the period for which the contract was made; that the witness as a representative of the Morehouse-Martens Company would not have made these contracts with the complainant if it had not been given the exclusive service of those illustrations in the city of Columbus; that after the service was begun under these contracts the witness noticed that the same Westermann illustrations were being used by other concerns in the city through the columns of the Dispatch, and called the attention of the advertising solicitors of the defendant company who were calling upon him, to the matter; that he did this immediately upon the first publication of any of these copyright illustrations by an advertiser other than the Morehouse-Martens Company; that the cases which the witness recalls most distinctly were those of an advertisement in the Ohio State Journal of Columbus, Ohio, and an advertisement of a millinery cut of The Columbus Wholesale Millinery Supply House in the defendant's newspaper; that the witness spoke to the representative of the Dispatch, Mr. A. E. Zollinger of this matter; that the witness received a copy of Exhibit "G" from the L. A. Westermann Company about November 6, 1911, and that thereupon said copy was posted upon the wall in the advertising office of the Morehouse-Martens Company; that thereafter representatives of the Dispatch came to that office to see the witness; that the representative of the Dispatch was the said Mr. Zollinger; that Mr. Zollinger saw the said paper, of which Exhibit "G" is a copy, and commented on it in a general way; that most of the business done by the witness with the Dispatch was done with Mr. Zollinger; that Mr. Zollinger was a solicitor; though occasionally there would be some matters which would be taken up with Mr. Young of the Dispatch; that witness had been engaged in the advertising business for thirteen years and that he was familiar with the sketches and illustrations as put out by companies in the advertising business, and that witness would be able to identify and recognize the Westermann illustrations.

And thereupon the plaintiff offered in evidence Exhibit "G" to which offer defendant objected, objection overruled; defendant excepted, and the same was received in evidence and marked Exhibit "G" and is attached hereto and made a part hereof.

Thereupon counsel for complainant asked the witness the following question:

"Mr. Parsons, state whether or not in your opinion, one who is familiar with the Westermann cuts and is dealing daily in

55 advertising features such as the Westermann Company and others put out, to milliners and dry goods houses, could, and in the exercise of the ordinary experience of their business would, know a Westermann cut from other cuts?" To which question counsel for the defendant objected, and which objection was sustained, to which ruling of the court the complainant excepted, and thereupon counsel for complainant stated that if the witness were permitted to answer the question, the answer to the same would be "yes."

And thereupon the witness was cross-examined by Smith W. Bennett, solicitor for defendant, and testified upon cross-examination as follows:

That during the time witness was with the Morehouse-Martens Company the advertising of the Morehouse-Martens Company with the defendant was under a contract for a certain specified amount of advertising space for a certain specified time, for which the Morehouse-Martens Company agreed to pay a specified amount; that these contracts were always signed by the business manager of The Columbus Dispatch, Mr. George E. Fowler, that no contracts were closed over the signature of the advertising solicitor; that witness does not know whether his conversation with Mr. Zollinger was ever reported to Mr. George E. Fowler.

Thereupon an adjournment was had until 9:30 A. M. of the following day, January 16, at which hour the trial proceeded.

Thursday, January 16, 1913—9:30 a. m.

Thereupon the complainant called as a witness on its behalf HARRY DE ROSTUS ROBERTSON, who being first duly sworn testified as follows:

Examined by Judge Williams:

The witness stated that he is the advertising manager of the Morehouse-Martens Company and that he had been with the Moresouse-Martens Company since June 1, 1911, and had been advertising manager for some time, the exact time he could not state.

Thereupon the witness produced a paper which was marked for identification as Exhibit "H" and testified that it was a letter written by the witness and mailed by him on the date shown on the letter to the L. A. Westermann Company; that the signature on said Exhibit "H" was the signature of the witness, the same appearing upon a slip of paper which had been cut from the letter, but which is now pasted upon said Exhibit "H."

56 And thereupon the complainant offered said Exhibit "H" in evidence to which the defendant objected; objection overruled; defendant excepted and the same was received in evidence and is attached hereto marked Exhibit "H" and made a part hereof.

The complainant having made demand upon the defendant for the production of certain letters alleged to have been written by Mr. Parsons to the defendant company about September, 1911, the complainant rested, with the reservation of the right to introduce testi-

mony in regard to said letters after search had been made for the same.

And thereupon the defendant, to maintain the issues on its behalf to be maintained, introduced and offered the following evidence, to wit:

The defendant thereupon called GEORGE E. FOWLER, as a witness on its behalf, who being first duly sworn testified as follows:

Examined by Mr. Bennett:

The witness stated that he had been connected with the Dispatch since January, 1910, as business manager; that he knew Mr. Zollinger and that Mr. Zollinger worked for the Dispatch Company, but left the service of the Dispatch about September 1, 1910, and that he had not been in the employ of the Dispatch Company since that time; that the witness had examined all of the exhibits attached to the bill of complaint in this case and had examined the cuts contained in the advertisements in the newspaper clippings attached as exhibits to the bill of complaint; that the witness, at the time those cuts were used as advertisements in the defendant's newspaper, did not know that the cuts were copyrighted, and that so far as the witness knew, no one else connected with the defendant company knew that they were copyrighted; that the instructions of the defendant company to the advertising department and other employes of said defendant company are that they should not use any cuts that are marked copyright, or any cuts that they think are copyrighted; that the witness had never knowingly used any cut that was copyrighted, nor so far as witness knew had the defendant company done so; that the practice of his office under the rules of the company regarding advertising matter was that advertising was solicited and secured from the advertiser, and brought to the office and if it was ordinary copy, taken to the composing room and set up; that if there was any doubt about the right to use it, the witness passed on it; that the instructions of the witness to advertising solicitors were that in
57 case of any doubt for any reason, it should be brought to the witness for decision; that none of the seven advertisements attached as exhibits to the bill of complaint herein were ever brought to the witness, or any one else, prior to publication; that witness first learned that these advertisements were claimed to be infringements when he read an article in the Columbus Citizen stating that his company had been sued.

Thereupon the witness was cross-examined by Judge Williams and testified as follows:

That witness knew Mr. Mead who was at one time a solicitor for the defendant; that he succeeded Mr. Zollinger; that in regard to the appearance in the Dispatch of October 15, (Exhibit "FF") as attached to the bill of complaint, of a copy of an illustration known as "Jury," without any copyright mark thereon, and the same illus-

tration which appears in Exhibit "F-1 Dispatch case" being the Dispatch for the said date where the illustration appears with the copyright notice on, Mr. Mead waited on the Morehouse-Martens Company, whereas another solicitor obtained the advertisements for The Columbus Millinery Supply House, and that it would be very easy for this other solicitor to bring in a clipping from the Columbus Millinery Supply House which had been previously clipped from some foreign paper, and that this other solicitor who waited on the Columbus Millinery Supply House would not have any knowledge of what was contained in the Morehouse-Martens copy for their advertisement; that he thinks the solicitor who waited on the Columbus Millinery Supply House on October 15th of that year was a man by the name of Stearns; that witness did not think that the advertisements in the paper for that date were inspected by any person before publication; that witness would not know the Westermann cuts unless they were so marked; that witness could not read the copyright notice on the illustration appearing in Exhibit "F-1 Dispatch Case" and that he recognized that the copyright notice was not on the other advertisement of the same date; that so far as witness knew he would say that the advertising solicitor had not cut off the copyright mark from this other advertisement; that witness did not know where Mr. Stearns was at this time; that witness was the person especially in authority to inspect copy, but that he did not inspect every illustration used in his paper, but only when there was some question about it; that he never examined any of the illustrations shown in the newspaper clippings attached to the bill of com-
58 plaint before they were published; that witness made examinations only in rare instances.

Thereupon the witness was examined on redirect examination by Mr. Bennett and testified as follows:

That the witness had never clipped a copyright mark off of any Westermann cuts nor had any solicitor done so, so far as the witness knew; that the clippings from which the cuts used in printing the advertisements attached as exhibits to the bill of complaint herein were never submitted to the witness; that the witness had never seen any of the clippings from which the said cuts were made before or after said clippings had been cut out of the original papers from which they came; that the witness had no personal knowledge, one way or the other, as to whether the copyright notices were cut off or were not cut off in his office.

Thereupon the defendant called HARVEY R. YOUNG, as a witness on its behalf, who being first duly sworn, testified as follows:

Examined by Mr. Bennett:

That the witness was employed as the advertising manager for the defendant and had been so employed since December 28, 1910; that he had had between fifteen and eighteen years' experience in the business before that time; that the defendant company in securing

advertising divided the city of Columbus into divisions of territory, with one solicitor for each division; that these solictors called on the advertisers in their territory; that the defendant company through its solicitors and other agents made suggestions to the advertisers and told the advertisers of the kind of advertising used in his line all over the United States in order to obtain an increased amount of advertising; that sometimes the solicitors presented to the advertiser sample forms of advertisements; that all the large stores which had advertising managers usually subscribed for newspapers from all over the United States which assisted the managers of stores in preparing copy for advertisements not only in wording but in illustrations; that the advertising writer of these stores looks over the forms and pictures in these papers and if he finds a good advertisement or a good illustration he sometimes uses it or a portion of it; that if the cut or illustration should be copyrighted and the defendant's advertising solicitor knew this, the solicitor would refuse to use it and tell the party that it was copyrighted and he could not use it; that these were the instructions to the solicitors; that the witness had examined all the exhibits attached to the bill of
59 complaint in this case and that one of these illustrations which was used by the Walter J. Dwyer Company was furnished by the witness personally by a Miss Murphy who had charge of the advertising for that company, that the defendant company used this illustration in its paper, but that it had no copyright mark on it; that it was not marked copyrighted when Miss Murphy gave it to the witness, but that the witness could not say anything about its condition before she gave it to him; that the witness did not know that the picture was copyrighted until this case was filed in this court; that, referring to the advertisement of The Childs Dry Goods Company, one of those attached to the bill of complaint, Mr. Childs wrote all of his own advertisements and selected his own illustrations; that sometimes a boy from the office would get the copy and that the witness always looked over the cuts to make them proper size, and if he saw the work was copyrighted he would not make the copy; that the cut in the Childs advertisement was furnished by Mr. Childs himself; that so far as the witness knew, no one connected with the defendant company ever knew that any of the copyright illustrations which were infringed by the defendant company were copyrighted; that Mr. Zollinger left the employ of the defendant in the fall of 1910, and had not worked for them since.

Thereupon the witness was cross-examined by Judge Williams, and testified as follows:

That the witness, although he had examined the pictorial print attached to the bill of complaint, as Exhibit "F" and the advertisement of the Max H. Rieser Company as contained in Exhibit "FFF" and attached to the bill of complaint and had examined them while testifying, he was unable to see any copyrighted mark on them, said prints examined by him being the original copyright prints, and

said advertisement being in the Dispatch of Friday, November 10th, 1911, Exhibit "FFF" attached to bill of complaint.

The witness further testified that he was not able absolutely to determine whether a given illustration was the work of one firm or another; that he might in a general way be able to guess at it, but that he had had no experience with the Westermann cuts until this case started.

Thereupon the witness, HARVEY R. YOUNG, was called for further cross-examination and testified as follows:

That the advertisement of The Max H. Rieser Company shown in the newspaper clipping attached to the bill of complaint as Exhibit "FFF" looked as if the cut at the top was the work of
60 the artist of the defendant company; that most of the Rieser cuts were made by the artist of the defendant company.

And thereupon the defendant called as a witness on its behalf, J. M. MEAD, who being first duly sworn testified as follows:

Examined by Mr. Bennett:

That he had been advertising solicitor for the defendant two years and four months, succeeding Mr. Zollinger; that he used the same method of soliciting advertisements from customers as the other solicitors; that the smaller advertisers sometimes needed a little help in writing their copy or in securing illustrations and that he sometimes submitted to advertisers articles and clippings from foreign papers; that the witness covered the south end of the city; that witness had not, to his knowledge, used any illustrations which were copyrighted; and that he had always been instructed to be very careful about using copyright matter and that he had always looked at each clipping to see that there was no copyright mark.

The witness was then cross-examined by Judge Williams and testified as follows:

That he saw some paper at the Morehouse-Martens Company like Exhibit "G," but that he did not know whether it was the same paper; in answer to the question whether it was posted up in the office of the Morehouse-Martens advertising department early in November, that he could not recall the date; that the witness covered the Morehouse-Martens Company at that time and that he remembered that some remarks had been made about this poster in a rather jocular way but he had paid very little attention to it and did not examine it closely; that these jocular remarks were to the effect that the Dispatch was using copyright matter.

The defendant also called, THOMAS C. ROBERTS, as a witness on its behalf, who being first duly sworn, testified as follows:

Examined by Mr. Bennett:

That the witness had been an advertising solicitor for defendant since September 10, 1909; that it was his custom to call on the different advertisers for their copy and that in the larger stores the copy was usually supplied by the advertising manager; that as to the smaller stores the witness frequently helped them in getting up ads and submitted illustrations and different ads to them from newspapers in different cities; that with the permission of the Columbus Citizen he had used some copyright illustrations but that this
61 was the only instance in which he had used any; that he had never used any Westermann illustrations, knowing them to be copyrighted; that he covered the north end of the city principally; that his instructions from his superiors were that he was not to use copyright illustrations, and that he obeyed these instructions.

No cross-examination.

And thereupon the complainant, in pursuance of the reservation made by it recalled EDWARD ROY PARSONS, as witness on its behalf who testified as follows:

Examined by Judge Williams:

That about September, 1911, the witness wrote a letter on behalf of the Morehouse-Martens Company to the business manager or the advertising manager of the defendant, calling attention to the fact that the Westermann illustrations had been used by other parties in its paper at the same time that the Morehouse-Martens Company was using them, and also calling attention to the fact that the Morehouse-Martens Company had the exclusive right to Westermann service in the city of Columbus; that the letter was mailed in due course; that the witness had made a thorough search for the copy of this letter but had been unable to find the same.

Thereupon the witness was cross-examined by Mr. Bennett and testified as follows:

That he fixed the date of this letter by the fact that it was written prior to the posting up of the poster in his office which is in evidence as Exhibit "G"; that this letter had been dictated to his stenographer and a carbon copy made, the filing of the letters being done by the stenographer; that some copies of letters had been destroyed and some filed away; that the carbon copies would be filed loose in a folder and afterwards transferred to cheap transfer cases; that so far as witness could remember he had never received any answer from the defendant; that he had made a search for this letter three or four months ago and had made another search the Monday before he testified; that the witness was sure he had written this letter; that he was quite sure that the letter was dictated

to the stenographer direct on the typewriter and that there were no shorthand notes; that the name of the stenographer was Mrs. Patrick and that the witness did not know where she was at the time he testified; that witness had no knowledge concerning whether the letter had been received by defendant; that this letter had been written to the defendant before the letter was written by Mr. Robertson to the Westermann Company, which is in evidence as Ex-
62 hibit "H"; that the witness and Mr. Robertson had a conference in regard to notifying the Westermann Company, before Mr. Robertson wrote the letter to the Westermann Company; that even before this letter was written to the Dispatch he had had some conversation with the advertising solicitor of the Dispatch in regard to these infringements, but that he had not mentioned this conversation in his testimony heretofore because he really considered that the letter was the first notification to the defendant company of these infringements; that witness did not mail this letter himself, and had no knowledge that the letter had been mailed.

Thereupon it was stipulated by counsel that if George E. Fowler and Harvey R. Young were recalled as witnesses on behalf of defendant they would testify that so far as they knew, no such letter as that referred to by Mr. Parsons had ever been received by the defendant company.

And thereupon the defendant rested.

And at this hearing the complainant offered no testimony in rebuttal.

Afterwards, to wit, on Tuesday morning, July 22nd, 1913, the parties hereto again appeared before the court and the complainant asked leave to introduce further testimony on its behalf, and the court thereupon granted such leave.

And thereupon its was agreed and stipulated by counsel representing all the parties hereto, that if the complainant's witness, L. A. Westermann, were recalled, and examined as a witness, he would further testify as follows:

"That the following exhibits which are now produced and identified as stated, to wit:

B-4 (Irene)
C-4 (Hake)
D-4 (Hack)
E-4 (Jury)
A-4 Dispatch case, (Intrigue)
C-4 Dispatch case, (Impact)

were each and all of them received by the L. A. Westermann Company in the regular course of mail from the register of copyrights with the stamp mark appearing upon the back of each of said

exhibits being the designation of class and number; that each of said exhibits is identical in every way with original pictorial illustrations theretofore forwarded by said L. A. Westermann Company to the register of copyrights for copyright as heretofore testified by him; and that he recognizes them as the same pictorial illustrations; that with each of said exhibits thus received in course of mail
63 from the copyright office there was also received a letter or a certificate of the register of copyrights making certain statements in regard to the return of each pictorial illustration just referred to, that said letter and certificate accompanying the return of said pictorial illustrations is the paper which is now identified by exhibit numbered as follows, to wit:

"I."

That each and all of the said exhibits above referred to were received in due course of mail by the L. A. Westermann Company in the ordinary government envelopes used by the register of copyrights, marked for governmental use and carried free from postage for governmental purposes.

And thereupon the complainant offered in evidence the said exhibits following, to wit:

B-4 (Irene)
C-4 (Hake)
D-4 (Hack)
E-4 (Jury)
A-4 Dispatch case, (Intrigue)
C-4 Dispatch case, (Impact)
I (Certificate of return of prints.)

and the same were received in evidence and are attached hereto and respectively marked Exhibits "B-4," "C-4," "D-4," "E-4," "A-4 Dispatch Case" and "C-4 Dispatch Case" and "I" and make a part hereof.

And thereupon the plaintiff rested.
And thereupon the defendant rested.

The foregoing is all of the testimony, evidence and exhibits introduced or offered in evidence by either of the parties hereto upon the trial of the foregoing action.

And thereafter to wit on the fourth day of August, A. D. 1913, an opinion was handed down by the court, now on file in the office of the clerk of this court; and thereafter, to wit, on the twenty-ninth day of April, 1914, the court found and decreed as is shown by the final decree of said court entered in said cause on the said twenty-ninth day of April, A. D. 1914, of record in said cause, to which judgment and decree of the court the complainant herein excepted.

And thereafter on the said twenty-ninth day of April, A. D. 1914, came the plaintiff and filed its motion for a new trial which said

motion for a new trial is on file in the office of the clerk of this court and of record herein, and thereupon the court considered said motion for a new trial and overruled the same, and thereupon on
64 the said thirtieth day of April, A. D. 1914, an order and decree was entered herein in the said court, overruling said motion for a new trial to which judgment and decree of the court the complainant herein excepted.

And now, in furtherance of justice and that right may be done, the plaintiff, L. A. Westermann Company, tenders and presents the foregoing as its bill of exceptions in this cause, taken on the trial thereof, and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record, and the same is accordingly done this twenty-fifth day of May, A. D. 1914.

In witness whereof, the judge of said court has hereunto attached his official signature as such, this twenty-fifth day of May, 1914, and during the term of said court at which said judgment was rendered and within the time allowed by the court for preparing and filing this bill of exceptions.

J. E. SATER,
Judge of the District Court of the United States,
Southern District of Ohio, Trial Judge.

(Here follow diagrams marked pp. 65 and 66.)

EXHIBIT "A-1"—DISPATCH CASE.

#742.

Westerman Co.
v.
The Dispatch Printing Co. } 66.

67 EXHIBIT A-3—DISPATCH CASE.

Copyright Office of the United States of America, Library of Congress, Washington.

Certificate of Copyright Registration.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, that two copies of the print or pictorial illustration named herein have been deposited in this office under the provisions of the said Act, and that registration for copyright for the first term of 28 years from the date of publication thereof has been duly made in the name of L. A. Westermann Co., New York, N. Y. Title of print: Intrigue. Copies received September 11, 1911. Date of publication, September 1, 1911. Entry: Class K, XXc., No. 28861.

[SEAL.] THORWALD SOLBERG,
Register of Copyrights.

(Here follow diagrams marked pp. 68 to 71, inclusive.)

EXHIBIT "A-4"—DISPATCH CASE.
Endorsed on back September 11, 1911. ℭ Cl. K. 2886.

Intrigue

7412.
Westermann Co.
v.
Dispatch Printing Co
p68

EXHIBIT "B."

#742
Westermann Co.
v.
Dispatch Printing Co.
} p 69.

EXHIBIT "B-1"—DISPATCH CASE.

742.
Westermann Co.
v
Dispatch Printing Co.
} 710

EXHIBIT "B-2"—DISPATCH CASE.

742

Westermann Co.
v.
Dispatch Printing Co.

} p 71

72 EXHIBIT B-3.

Copyright Office of the United States of America, Library of Congress, Washington.

Certificate of Copyright Registration.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Act respecting Copyright approved March 4, 1909, that two copies of the print or pictorial illustration named herein have been deposited in this office under the provisions of the said Act, and that registration for copyright for the first term of 28 years from the date of publication thereof has been duly made in the name of A. L. Westermann Co., New York, N. Y. Title of print: Irene. Copies received September 11, 1911. Date of publication, September 1, 1911. Entry: Class K, XXc., No. 28864.

[SEAL.] THORWALD SOLBERG,
Register of Copyrights.

(Here follows diagram marked p. 73.)

74 EXHIBIT C-3.

Copyright Office of the United States of America, Library of Congress, Washington.

Certificate of Copyright Registration.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, that two copies of the print or pictorial illustration named herein have been deposited in this office under the provisions of the said Act, and that registration for copyright for the first term of 28 years from the date of publication thereof has been duly made in the name of L. A. Westermann Co., New York, N. Y. Title of print: Hake. Copies received, August 16, 1911. Date of publication, August 15, 1911. Entry: Class K, XXc., No. 27945.

[SEAL.] THORWALD SOLBERG,
Register of Copyrights.

(Here follow diagrams marked pp. 75, 76 & 77.)

EXHIBIT "C-4"—DISPATCH CASE.
Endorsed on back: Aug. 16, 1911. ℄ Cl. K. 27945

Xake
#742

Westermann Co
v
Dispatch Printing Co.
} P 75

EXHIBIT "C-1"—DISPATCH CASE.

#742.

Westermann Co.
Dispatch Printing Co } $77

4
6

78 EXHIBIT C-3—DISPATCH CASE.

Copyright Office of the United States of America, Library of Congress, Washington.

Certificate of Copyright Registration.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, that two copies of the print or pictorial illustration named herein have been deposited in this office under the provisions of the said Act, and that registration for copyright for the first term of 28 years from the date of publication thereof has been duly made in the name of L. A. Westermann Co., New York, N. Y. Title of print: Impact. Copies received, September 11, 1911. Date of publication, September 1, 1911. Entry: Class K, XXe., No. 28845.

[SEAL.] THORWALD SOLBERG,
Register of Copyrights.

(Here follow diagrams marked pp. 79, 80 & 81.)

EXHIBIT "C-4"—DISPATCH CASE.
Endorsed on back: Sept. 11, 1911. (Cl. K. 28845.

Impact

742.

Westermann Co.
vs
The Dispatch Printing Co.
P 79.

EXHIBIT "CC-3"—DISPATCH CASE.

THE COLUMBUS EVENING DISPATCH, TUESDAY, SEPTEMBER 19, 1911.

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#742.

Westermann Co.
v.
Dispatch
Printing Co.
} p80

82 EXHIBIT D-3.

Copyright Office of the United States of America, Library of Congress, Washington.

Certificate of Copyright Registration.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, that two copies of the print or pictorial illustration named herein have been deposited in this office under the provisions of the said Act, and that registration for copyright for the first term of 28 years from the date of publication thereof has been duly made in the name of L. A. Westermann Co., New York, N. Y. Title of print: Hack. Copies received, August 16, 1911. Date of publication, August 15, 1911. Entry: Class K, XXc., No. 27975.

[SEAL.] THORWALD SOLBERG,
Register of Copyrights.

(Here follow diagrams marked pp. 83, 84 & 85.)

EXHIBIT "D-4."
Endorsed on back: Aug. 16, 1911. ℄ Cl. K. 27975.

Back

#742.
Westermann Co.
v.
Dispatch Printing Co
} $83.

EXHIBIT "E-1."

#742.

Westermann Co.,
v
Dispatch Printing Co

D 83.

86 EXHIBIT E-3.

Copyright Office of the United States of America, Library of Congress, Washington.

Certificate of Copyright Registration.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, that two copies of the print or pictorial illustration named herein have been deposited in this office under the provisions of the said Act, and that an entry for copyright for the first term of 28 years from the date of publication thereof has been duly registered in the name of L. A. Westermann Co., New York, N. Y. Entitled: Jury. Date of publication, September 19, 1911. Copies received, September 27, 1911. Entry: Class K, XXc., No. 29789.

[SEAL.] ERNEST BRUNCKEN,
Assistant Register of Copyrights.

EXHIBIT H.

Same letter as is reproduced in middle of Exhibit G, Page — supra.

(Here follow diagrams marked pp. 87, 88 & 89.)

EXHIBIT "E-4."
Endorsed on back: Sept. 27, 1911. ((Cl. K. 29789.

#742.
Westermann Co.
vs
Dispatch Printing Co

EXHIBIT "F-1"—DISPATCH CASE.

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Morehouse-Martens

#742.

Westermann Co.
v.
Dispatch Printing Co } P 88

90 EXHIBIT I.

Office of the Register of Copyrights.
R. C. D.-A. R. M.

Library of Congress,

Copyright Office,

Washington, February 5, 1913.

GENTLEMEN: We have received from your attorneys, Messrs. Williams, Williams, Taylor & Nash, Columbus, Ohio, a letter requesting the return to you of the copies of the following prints deposited and registered for copyright in your name:

Hake, filed August 16, 1911, No. 27945.
Hack, filed August 16, 1911, No. 27975.
Intrigue, filed September 11, 1911, No. 28861.
Impact, filed September 11, 1911, No. 28845.
Irene, filed September 11, 1911, No. 28864.
Jury, filed September 27, 1911, No. 29789.

The titles of these works furnish little clue to their character, and the office has discontinued returning as a matter of course both copies of such prints to the copyright claimant. It seems permissible, however, to return one copy of each print in this case, as they are needed for your use in an infringement suit, and we, therefore, do so, retaining the other copy for the copyright files. These copies are returned under the provision of Sections 59 and 60 of the copyright Act and may be retained by you. Please acknowledge their receipt by number and title.

In any future case, where the return of copies is desired, it will be best to submit a request over your own name, with the signature of an officer of the company annexed. In this case, however, to save delay, we have thought it permissible to accept a request from your attorneys.

Respectfully,
[SEAL.] THORWALD SOLBERG,
Register of Copyrights.

L. A. Westermann Co., 41 Union Square, New York, N. Y.

Enclosures: 6 prints.

91 *Order.*

Entered June 18, 1914.

Upon the application of complainant and for good cause shown the return days of the citations on appeal and error herein are extended for the further period of thirty days from the former order of ex-

tension herein, to wit, until the 28th day of July, 1914, to which the defendant excepts.

Approved:

S. W. BENNETT,
Attorney for Defendant.

WILLIAMS, WILLIAMS, TAYLOR & NASH,
For Appellant.

Certificate.

THE UNITED STATES OF AMERICA,
Southern District of Ohio,
Eastern Division, ss:

I, B. E. Dilley, clerk of the District Court of the United States of America, within and for the division aforesaid do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause, as the same appears of record in the clerk's office of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this — day of ——, 1914.

—— ——, *Clerk,*
By —— ——, *Deputy.*

92 PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Appearance of Counsel.

(Filed July 22, 1914.)

Frank *of* Loveland, Clerk of said Court:

Please enter *my* appearance as counsel for the appellant.

WILLIAMS, WILLIAMS, TAYLOR & NASH.

Entry—Case Argued and Submitted.

(Feb. 8, 1916—Before Warrington, Denison, and Killits, JJ.)

This cause is argued by Mr. Simeon Nash for the appellant and Plaintiff in Error and by Mr. Smith W. Bennett for the Appellant and Defendant in Error and is submitted to the Court.

93 *Decree.*

(Filed June 16, 1916.)

Error to and Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the writ of error be dismissed and that the decree of the said District Court, in this cause be and the same is hereby reversed with costs, and the cause is remanded to said District Court with instructions to enter a decree for the complainant for two hundred and fifty dollars damages and costs and the attorney fee already fixed.

Opinion.

(Filed June 22, 1916.)

94 Filed Jun. 22, 1916. Wm. C. Cochran, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2663.

L. A. WESTERMANN COMPANY, Plaintiff in Error and Appellant,

vs.

THE DISPATCH PRINTING COMPANY, Defendant in Error and Appellee.

Appeal and Writ of Error from the District Court of the United States for the Southern District of Ohio, Eastern Division.

Submitted February 8, 1916; Decided June 16, 1916.

Before Warrington and Denison, Circuit Judges, and Killits, District Judge.

DENISON, *Circuit Judge:*

The appellant was the plaintiff below. Although a corporation, it seems to be the enterprise of Mr. Westermann, and it will be convenient to speak of him as the plaintiff. The defendant was a newspaper publishing corporation. Plaintiff was engaged at New York in the business of selling illustrations of styles for women's dress. Pursuing his long-established method of business, when the fall sea-

son of 1911 approached he employed Mrs. Westermann, as artist and designer, to observe and reproduce and to design sketches of hats and gowns, among other things, illustrative of fall styles. These sketches showed women as they would appear wearing such articles, and were artistic and attractive. The sketches were then grouped, eight or ten together, and printed upon large display sheets. Each
sketch was separately deposited with the Register of Copy-
95 rights and copyright claimed thereon; and each sketch when published in the group carried independently the copyright notice. Westermann sent these display sheets, as issued from time to time, to his mailing list of 1200 retail dealers in women's dress throughout the United States, accompanied by an offer to sell to each dealer electro-plates of any desired sketch, with the exclusive right to use it in the dealer's town. This record shows that Westermann published and distributed at least six such display sheets, two on August 15th, three on September 1st and one on September 19th. He made a contract covering the season with Morehouse, a retail dealer at Columbus, Ohio, somewhat varying the general method of business, and whereby it was agreed that Westermann should furnish Morehouse these style sheets, and that Morehouse, in consideration of a fixed sum, should have the exclusive right in Columbus to reproduce any of these sketches which he desired to use in his Columbus newspaper advertising.

At intervals from September 19th to October 15th the defendant newspaper published six advertisements for five Columbus retailers other than Morehouse, in each one of which six advertisements there was reproduced one of the copyrighted sketches, no one being used twice. November 10th defendant reproduced in its newspaper for still another advertiser the same sketch which it had once published on October 15th. No two of these six sketches were included by plaintiff in any one of his display sheet groups.

In the court below Westermann filed his bill of complaint setting out these facts, alleging that it was impossible to show by proof the actual damages suffered, and that he elected to take and demand the alternative "just" damages given by Sec. 25 of the Copyright Law (Act March 4, 1909, 35 Stat. L. 1075), asking a judgment for the maximum of $5,000 for each of the seven alleged infringing publications, and asking also an injunction.

Defendant answered; plaintiff replied; proofs were taken in open court; all of the issues were found in favor of plaintiff; and his damages were fixed at $10.00 for each infringement. The defendant was content; the plaintiff brought the case here on appeal and on writ of error.

1. The case must be treated as an equity case here on appeal.
Sec. 27 provides that all proceedings contemplated by the
96 act, including those for injunction, damages, profits, and for the seizure of infringing copies, etc., may be united in one action. It is easy to see that composite actions might be brought which it would be difficult to classify as between equity and law; but there is no such difficulty here. The prayer for damages in connection with the injunction, does not at all disparage the dominant equitable character of the proceeding. The awarding of such dam-

ages is within the customary powers of a court of equity. Plaintiff adopted, and defendant accepted, all the forms of a proceeding in equity; and the suit must be so considered. It follows that we must decide the questions of fact as well as those of law involved, save that, under familiar rules, the conclusion of the trial court on questions of fact will not be lightly disturbed. Although the testimony is here upon a so-called bill of exceptions, we think the intention is clear enough that it should be treated also as a statement of evidence, under equity rule 75; and it will be so regarded.

2. Issues as to the necessity of making Morehouse a party, as to the copyrightable character of the sketches, as to the effectiveness of the registration proceedings, and as to the sufficiency of the notice and defendant's knowledge,—all were decided against defendant, and defendant has not appealed. While it would be open to us to consider such issues, because involved in any judgment for plaintiff, yet in this case we see no reason for considering them on our own motion, and in the absence of any complaint. We therefore assume that the court below was correct in these particulars, and that the only question for consideration is the one which alone the parties have presented, viz: the proper measure of damages under Section 25, as applied to the facts of this case.

3. Sec. 25, so far as pertinent, is quoted in the margin.(1) By the clause "in lieu thereof" it contemplates an election or
97 discretionary choice between actual damages and profits on the one side, and, on the other side, an assumed or somewhat arbitrary award of such damages as may be just. Plaintiff claims that the copyright proprietor is entitled to make this election, and to plant his action arbitrarily and absolutely upon one theory or the

(1) "Sec. 25. (Infringement—Liability.) That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) To an injunction restraining such infringement;

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty:

First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section five of this act, except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

Fourth. In the case of a dramatic or dramatic-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance."

other; defendant insists that the election or the discretionary choice is to be made by the court upon the trial. The plaintiff here made the election, if he had the power to do so; and on the evidence there can be no doubt that this was not a case for actual damages, as distinguished from those damages which might be fair and just, and that the court, if called upon to act, must make the same election as plaintiff did. Defendant made no profits, so far as the proofs indicated; the plaintiff's damages rested in the injury to his Morehouse contract, and in the discouragement of and the tendency to destroy his system of business. To make any accurate proof of actual damages was obviously impossible. This case must therefore be treated, from any point of view, as one calling for the application of the "in lieu" portion of the statute.

4. The statute says that "such damages shall" be governed by a maximum and minimum. Whether this phrase, "such damages," and the maximum and minimum limitations, apply to the actual damages which may be proved and established under the first part of this section, or only to the "just" damages given "in lieu of actual damages," cannot be determined from mere arrangement of the language, but must depend upon more indirect interpretation. This question likewise does not directly require decision in this case. The limitations unquestionably apply to the "in lieu" damages, which are the only ones here involved; their application to actual damages may be passed over.

5. The arrangement of section 25 is awkward. In effect, the provisions for maximum and minimum immediately follow
98 the classification, so that the statute must be treated as if it read: "or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may in its discretion allow $10.00 for every copy of a painting, etc., $1.00 for every copy of any other work, etc., $50.00 for every delivery of a lecture, etc., and $10.00 for every performance of musical compositions, except etc.,—but in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of $200.00 nor be less than the sum of $50.00, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty."

6. We see no escape from the application of the $250 minimum in a case like this. It is difficult to think of any reason why a newspaper reproduction of a copyrighted pen and ink drawing of a hat should not be classified with a newspaper reproduction of a copyrighted photograph of similar articles; but it is not, and these sketches here involved are not photographs,—though they might as well have been,—and unless the word "photograph" is restricted to its established meaning, no line can be drawn; hence the $50.00 photograph minimum cannot apply.

It seems to us the plain meaning of the language that Congress intended that the plaintiff should not recover less than $250 damages in any copyright infringement suit not based upon a newspaper reproduction of a photograph,—at least in any case where the actual

damages fail to appear so clearly and so fully as to forbid resort to the "in lieu" class. The necessary effect of the provision is to prohibit the award of merely nominal damages. This intent implies no undue harshness. Not only does the typical copyright infringement, if not every one, involve indirect damages almost sure to be considerable, but in few cases would one sum of $250 more
99 than compensate plaintiff for his time, trouble and expense in detecting, following up and prosecuting an infringement. It would seem that the words "shall not be regarded as a penalty" were added out of abundant caution, for under such a situation as usually exists on this subject the awarding of a round sum in damages is no more a penalty when the damages are liquidated by a court than when they are liquidated by a contract.

The act of 1909 is not new in this respect. R. S. 4964 provided that one who unlawfully reproduced a copyrighted book should pay such damages as may be recovered in a civil action; Sec. 4965 provided redress for infringement of copyrights other than for books, which redress consisted of "forfeiting" (one-half to the proprietor and one-half to the United States) one dollar for each infringing copy; and this section further provides, with reference to the infringement of a print, that "the sum to be recovered in any action brought through the provisions of this section shall not be less than $250"; Sec. 4966 covers infringement of copyrighted dramatic and musical compositions, and says that the infringer "shall be liable for damages therefor and such damages in all cases shall be assessed at such sum, not less than $100 for the first and $50 for every subsequent performance, as to the court shall appear to be just." This last provision was under consideration by the Supreme Court in Brady v. Daly, 175 U. S. 148. It was held that the minimum provision was not one for a penalty, and that in default of proof of actual damages the plaintiff was at all events entitled to recover this minimum. After this construction of R. S. 4966 the same language was adopted into Sec. 25 of the Act of 1909, although its application was extended to all copyrights; and Brady v. Daly must have the effect of a decision that under the present statute the plaintiff may recover at least the minimum.

7. When we observe that a single act in reproduction of a single copyrighted print is such an infringement as will support an action and a recovery under Section 25, it is natural to assume that each such act calls for the minimum damages, and perhaps this natural assumption tends to persuade that Congress did not intend to abolish merely nominal damages (Woodman v. Lydiard-Peterson Co.—D. C. Minn.—192 Fed. 67, affirmed 204 Fed. 921, 205 Fed. 900); but the conclusion is not inevitable. The "infringement" for which an action will lie is not necessarily the same "infringement" for
100 which the minimum damages are provided. The same word may have different meanings, even in parts of the same statute, if the context and reasonable construction so require (American Co. v. District of Columbia, 224 U. S. 491, 494).

The language of the statute is "if any person shall infringe the copyright in any work protected under the copyright laws of the

United States, such person shall be liable * * * to pay the copyright proprietor * * * such damages as to the court shall appear to be just, etc." What did Congress mean when it referred to the "infringement" for which not less than $250 must be paid? The common instance, such as Congress probably had in mind, is clear. In case of an unauthorized publication of a copyrighted book, or an infringing edition of a copyrighted song, there are clearly one right and one violation, though an infringing edition may contain many copies. The statute has recognized that in some instances acts of infringement, though connected and united, may require separate treatment, and in other instances (newspaper reproduction of photographs) a number, perhaps a vast number, of acts are treated collectively as one infringement; but in still other instances the statute is wholly silent in these respects. The publishing of an edition of a thousand books is an infringement; so is the putting on sale of one of them. Using the analogy of the patent law, the manufacture and sale of one article is an infringement sufficient to support an action; yet all the conduct of the defendant in continuing the manufacture and sale over a period of years may be "the infringement" for which damages will be assessed at the end of the action. There is no corresponding damage statute in the patent law to make the analogy complete; but can it be supposed that the copyright proprietor can take each infringing act out of a series or group, even though each one is sufficient to support an action, and then plant a separate action or complaint upon each, and so recover his minimum damages practically as many times as he chooses? These and other considerations convince us that the "infringement" which calls for minimum damages is that conduct of the defendant, whether being one act or many, which constitutes a connected and fairly unitary invasion of the proprietor's rights. Intermittent newspaper publication forms merely an extreme instance of difficulty in applying this definition.

101 8. We are on more uncertain ground when we attempt to define that right of the copyright proprietor which is contemplated by the minimum damage provision. What is meant by "the copyright in any work protected," etc.? Here again the case of a book or musical composition is simple; but when the copyright law is used as an aid to business enterprises, other than the printing and sale of books and pictures, we find indefiniteness. Whatever may have been the rule under the former law, Section 3 of the Act of 1909 operates to give the proprietor the election between claiming copyright his "work" as an entirety or by units, and, whichever way it is done, each unit is equally protected. Each one of a number of short stories may be separately copyrighted as it appears from month to month, and then they may go upon the market grouped as a book, or they may be withheld and all first published in book-form and copyrighted as an entirety, or they may be copyrighted as they serially appear, and then again in their grouped form. In any event, it is an infringement of the proprietor's rights to republish any one of the stories, and it is an infringement of his rights to republish the whole book. A furniture manufacturer may

have a hundred artistic cuts or prints showing his product. He may copyright them separately and then unite them in his published catalogue, or he may first copyright the whole catalogue, making one registration; in either event, it is an infringement of his rights to republish any one print or to republish the whole catalogue. We cannot believe that the application of the minimum damage law is controlled by that form of copyrighting, by group or by unit, which the proprietor chooses or happens to adopt. If the form of registration determines the nature of the right which is infringed, and so if it must be assumed that each impairment of a separately registered copyright is a separate infringement, it follows in the case of a catalogue that if the proprietor registers the entire at once, and if a defendant has republished the entire, the proprietor's maximum damage (at least under the "in lieu" clause) is $5,000; while if he has separately registered each one of his 100 prints, and put out the same catalogue, and the defendant has republished the same catalogue, we see the plaintiff's right is the same as before and that the defendant's infringement is the same as before, and yet the minimum damage permissible under the statute would be $25,000.

While this is the first thought interpretation of the words of
102 the law, yet we know it cannot be the real intent. The damages would have been "irrationally increased. We believe Congress meant no such result." (American Co. v. District of Columbia, supra, at p. 495.) If the language permits, we must find some more reasonable construction even if inconsistent with the letter (Church v. United States, 143 U. S. 457). We see no insuperable objection to supposing that the "copyright in any work protected," etc., may refer as well to a composite or grouped right as to each separate item of the group, and we are satisfied to interpret the statute as saying, in effect, that in any case where a party shows that his property rights and interests protected by the copyright law have been invaded by the defendant, the damages (under the "in lieu" clause) must not be more or less than the stated amounts; even though the right is composite and the invasion is composite. It will follow that it must be determined by the court as a fact in each case whether one right or more than one has been impaired, and whether the acts of the defendant in taking are to be considered as one infringement or more than one.

We are somewhat fortified in this conclusion, by observing the distinct difference in theory between the old (R. S.) and the new (1909) copyright laws. Under the old law, the statutory monopoly was rested upon registration, which must be initiated on or before publication. The certificate of registration was not only evidence of title but its preliminaries constituted the final step in the otherwise incomplete statutory grant. Under the new law, the exclusive right is fixed at the instant of and by the fact of publication, with notice; the registration is incidental and may be long postponed. The publication of the complete book, with notice, perfects the right; are its character and incidents to be changed by subsequently filing the chapters separately for registry? So, the trade cuts may be put out, one each day, each with notice of copyright claim, but the only

thing filed for registry may be the complete catalogue; the rights resulting from publication would seemingly be neither enlarged or diminished. As the registration has become more incidental and nonessential, by so far its form must have become less important in fixing substantial rights.

In determining the above stated question of fact, the power and duty of consolidation may be useful as a test. If a plaintiff copyrights separately ten cuts, and finds each one of the ten infringed on separate days by the same newspaper, and then brings
103 ten separate injunction and damage suits, on application to compel consolidation the court would look into the facts and ascertain whether there were really ten controversies involving ten questions or whether there was just the one dispute involving one question, and probably would consolidate or not, according as it decided this question. If these suits were consolidated upon a finding that there were really only one controversy and one injury to the plaintiff's business, or if the plaintiff in the first place brought one consolidated suit, we think it is evident that the statute may be satisfied by awarding the minimum damages as for one infringement. This construction of the law does not compel the proprietor to register all together items which he wishes to register separately He may adopt the latter course and derive any direct or indirect advantages properly incidental; but it does not follow that one of these incidental advantages is to give the minimum damage clause an effect which could not have been intended. Nor does this construction imply that the damages for republishing a complete set of separately copyrighted books would be no more than for republishing one volume of the set. A set of books is not a unit in the same sense that one book is. The application of the law to such a case the court would determine according as it determined the facts.

We do not overlook that a proprietor who had such separate copyright registrations as are here involved might bring a suit based upon one item only, and after the first suit was finished bring another based upon another item, or he might be able to bring several simultaneously in different jurisdictions, and thus in one way or the other escape consolidation. However, it will be time to meet such a problem when it arises; situations hard to dispose of can always be imagined; the possibility of such difficulty will not prevent what seems the reasonable construction in the ordinary case.

Applying this principle to the present case, we find first that all the cuts here involved relate to a single subject, viz., fashions for women's wear for a single season; the constituent parts of such a subject are, obviously and necessarily, closely related; they comprise a unitary object and effect; the aim must be to meet the tastes of women collectively as well as separately. We find also that plaintiff had united and tied together all his six separately copyrighted cuts as completely as if he had published them only in one
104 catalogue or one book. He had done this, so far as this case is concerned, by uniting them in a season's service which he had sold exclusively for Columbus to Morehouse. His entire busi-

ness enterprise protected by copyrights was represented in Columbus by his Morehouse contract. His right, which was involved and which was impaired, was the exclusive right to publish in Columbus this group of pictures for this season; and this was in substantial effect one right. The defendant newspaper published on several days several items of this group, but these publications were all incidents of one course of conduct; they all occurred within a short time; they ceased as soon as complaint was made. We think it reasonable to say that within the purview of this minimum damage clause they constituted one infringement.

The decree must be reversed, and the cause remanded, with instructions to enter a decree for plaintiff for two hundred and fifty dollars damages and costs and the attorney fee already fixed. The writ of error is dismissed.

We thus definitely direct the precise decree to be entered below in order that no lack of finality in our decree may embrace any effort to take the opinion of the Supreme Court; we have considered certifying the questions, but we find our doubts hardly sufficient to justify this course.

105 United States Circuit Court of Appeals for the Sixth Circuit.

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of L. A. Westermann Company vs. Dispatch Printing Company No. 2663, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 9th day of October, A. D. 1916.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

106 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which L. A. Westermann Company is plaintiff in error and appellant, and The Dispatch Printing Company is defendant in error and appellee, No. 2663, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to and an appeal from

the District Court of the United States for the Southern District of Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
107 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifteenth day of November, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit, *ss:*

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 21st day of November, 1916, there was filed in my office a stipulation in the above entitled case in the following words, towit:

United States Circuit Court of Appeals, Sixth Circuit.

No. 2663.

L. A. Westermann Company, Plaintiff in Error and Appellant,

vs.

The Dispatch Printing Company, Defendant in Error and Appellee.

Stipulation.

It is stipulated and agreed by and between L. A. Westermann Company, plaintiff in error and appellant, and The Dispatch Printing Company, defendant in error and appellee, that the certified transcript of record made by the Clerk of this Court and now on file in the Supreme Court of the United States may be accepted and taken as the record and proceedings of this court in said cause, and that the same may be accepted as a true and due return of the Writ of Certiorari of the Supreme Court of the United States issued to this Court; also, that a certified copy of this stipulation may be forwarded

by the Clerk of the United States Circuit Court of Appeals for and in lieu of such new certification.

Dated the 21st day of November, 1916.

L. A. WESTERMANN COMPANY,
By CURTIS C. WILLIAMS,
Its Attorney and Counsel.
THE DISPATCH PRINTING COMPANY,
By SMITH W. BENNETT,
Its Attorney and Counsel.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official seal, signature and the seal of said Circuit Court of Appeals at the city of Cincinnati, in said circuit this 21st day of November, A. D. 1916.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] File No. 25572. Supreme Court of the United States, October Term, 1916. No. 742.

L. A. Westermann Company vs. The Dispatch Printing Company.

Filed Nov. 21, 1916. Wm. C. Cochran, Clerk.

Writ of Certiorari.

08 [Endorsed:] File No. 25572. Supreme Court U. S., October Term, 1916. Term No. 742.

L. A. Westermann Co., Petitioner, vs. The Dispatch Printing Co. Writ of certiorari and return. Filed November 22, 1916.

NO. [redacted]50

IN THE

Supreme Court of the United States

THE PETITION OF L. A. WESTERMANN COMPANY FOR A WRIT OF CERTIORARI DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, TO BRING BEFORE THE SUPREME COURT THE CASE OF L. A. WESTERMANN COMPANY,

Petitioner,

vs.

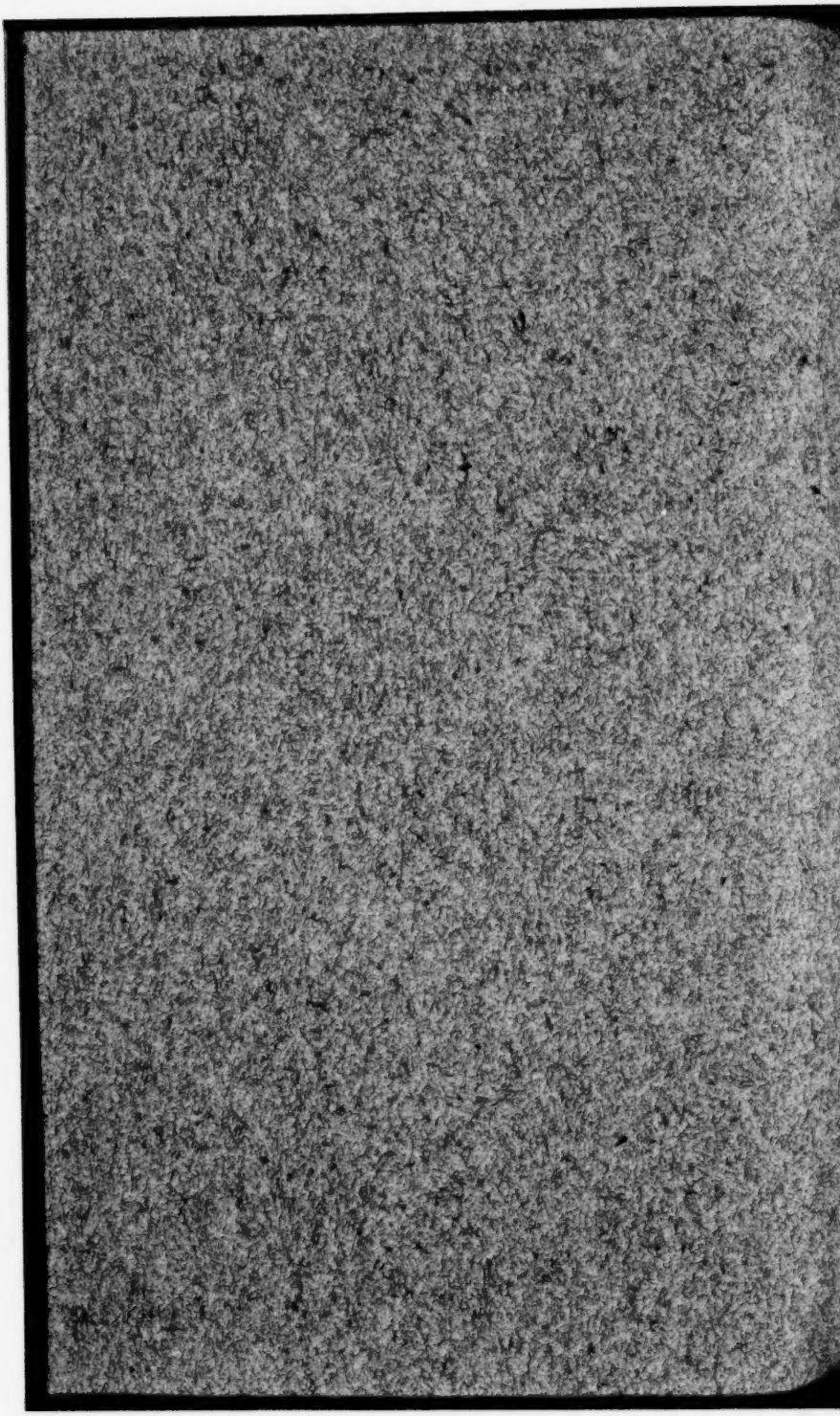
THE DISPATCH PRINTING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF SAME

CURTIS G. WILLIAMS,
SIMEON NASH,
Attorneys for Petitioner.

F. H. TOOTHAKER, Law Printer, 19-21 N. Third St., Columbus, Ohio.



IN THE

Supreme Court of the United States

THE PETITION OF L. A. WESTERMANN COMPANY FOR A WRIT OF CERTIORARI, DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, TO BRING BEFORE THE SUPREME COURT THE CASE OF L. A. WESTERMANN COMPANY,

Petitioner,

vs.

THE DISPATCH PRINTING COMPANY,

Respondent.

To the Supreme Court of United States of America:

The said petitioner respectfully shows to this court as follows:

I. The petitioner, L. A. Westermann Company, was at the time of the commencement of this suit, and now is, a corporation duly organized and existing under the laws of the state of New York, and a citizen of that state; and the respondent, The Dispatch Printing Company, was at that time and now is a corporation of the state of Ohio, having its principal place of business in the city of Columbus.

II. The Dispatch Printing Company was during all the times hereinafter mentioned and now is, engaged in the publication of a daily newspaper printed and published in the city of Columbus, Ohio, and having a large circulation throughout said city of Columbus and said state of Ohio and in the publication of said newspaper said company received and published for profit numerous advertisements.

III. L. A. Westermann Company during all such times was engaged in the business of designing and vending under the protection of lawful copyrights suitable and appropriate prints and pictorial illustrations to be used by such milliners and merchants as might secure from it the right so to do in advertising their business; and by reason of the skill and artistic sense employed by it in its said business and by large expenditures of money and efforts in making known to its customers the advantages of such prints it had built up a successful and profitable business in that line, the success and profit of which however, was and is wholly dependent upon the protection and right afforded it and the fruits of its industry and skill under the copyright laws; and as a part of said business it designed and executed certain prints and pictorial illustrations, hereinafter specifically described, for the purpose aforesaid, and secured copyrights thereon in conformity with the statutes in that respect by publication thereof with a notice of copyright in due form affixed to each copy thereof and promptly depositing in the copyright office at Washington, D. C., two complete copies of each of said prints and pictorial illustrations and the register of copyrights did thereupon issue to it a certificate of copyright registration of said prints and pictorial illustrations as required by law.

That one of the prints and pictorial illustrations so copyrighted by it is entitled "Intrigue," and the date of its publication as aforesaid is September 1, 1911, its entry Class K, XXc, No. 28861, and copies thereof were delivered to and received by the register of copyrights on September 11, 1911, and he thereupon issued to it its certificate of copyright registration as required by law.

Another of the prints and pictorial illustrations so copyrighted by the petitioner is entitled "Irene," and the date of its publication as aforesaid is September 1, 1911, its entry Class K, XXc, No. 28864, and copies thereof were delivered to and received by the register of copyrights on September 11, 1911, and he thereupon issued to it its certificate of copyright registration as required by law.

Another of the prints and pictorial illustrations so copyrighted by the petitioner is entitled "Impact" and the date of its publication as aforesaid is September 1, 1911, its entry Class K, XXc, No. 28845, and copies thereof were delivered to and received by the register of copyrights on September 11, 1911, and he thereupon issued to L. A. Westermann Company its certificate of copyright registration as required by law.

Another of the prints and pictorial illustrations so copyrighted by the petitioner is entitled "Hake," and the date of its publication as aforesaid is August 15, 1911, its entry Class K, XXc, No. 27945, and copies thereof were delivered to and received by the register of copyrights on August 16, 1911, and he thereupon issued to it its certificate of copyright registration as required by law.

Another of the prints and pictorial illustrations so copyrighted by the petitioner is entitled "Hack," and the date of its publication as aforesaid is August 15, 1911, its entry class K XXc, No. 27975, and copies thereof were delivered to and received by the register of copyrights on August 16, 1911, and he thereupon issued to it its certificate of copyright registration as required by law.

Another of the prints and pictorial illustrations so copyrighted by the petitioner is entitled "Jury," and the date of its publication as aforesaid is September 19, 1911, its entry Class K XXc, No. 29789, and copies thereof were delivered to and received by the register of copyrights on September 27, 1911, and he thereupon issued to it its certificate of copyright registration as required by law.

IV. The Dispatch Printing Company infringed on copyrights of petitioner by causing said copyrights to be printed, reprinted and published, without any authority or right from L. A. Westermann Company so to do, many copies of said print and pictorial illustrations entitled "Intrigue," to wit: Thirty-five thousand (35,000) copies as a part of an advertisement for The Fashion, a millinery store, in The Columbus Evening Dispatch, a newspaper of great and wide circulation in the city of Columbus, Ohio, and adjacent country, on Tuesday, September 19, 1911, said defendant company, the owner, proprietor and publisher of said Columbus Evening Dispatch on said date, having itself printed, published and caused to be printed and published said advertisement and said print and pictorial illustration entitled "Intrigue."

And by likewise printing, reprinting and publishing without such authority or right many copies of said print and pictorial illustration entitled "Irene," to wit: thirty-five thousand (35,000) copies as a part of an advertisement for The Walter J. Dwyer Company in The Columbus Evening Dispatch, a newspaper of great and wide circulation in the city of Columbus, Ohio, and adjacent territory, on Thursday, September 21, 1911, said defendant company, the owner, proprietor and publisher of said Columbus Evening Dispatch on said date, having itself printed, published and caused to be printed and published said advertisement and said print and pictorial illustration entitled "Irene."

And by likewise printing, reprinting and publishing without such authority or right many copies of said print and pictorial illustration entitled "Impact," to wit: thirty-five thousand (35,000) copies as a part of an advertisement for Childs Dry Goods Company in The Columbus Evening Dispatch, a newspaper of great and wide circulation in the city of Columbus, Ohio, and adjacent territory, on Friday, September 29, 1911, said defendant company the owner, proprietor, and publisher of said Columbus Evening Dispatch on said date, having itself printed, published and caused to be printed and published said advertisement and said print and pictorial illustration entitled "Impact."

And by likewise printing, reprinting and publishing without such authority or right many copies of said printed and pictorial illustrations entitled "Hake," to wit: forty thousand (40,000) copies as a part of an advertisement for The Columbus Millinery Supply House in The Columbus Sunday Dispatch, a newspaper of great

and wide circulation in the city of Columbus, Ohio, and adjacent territory, on Sunday, October 1, 1911, the owner, proprietor and publisher of said Columbus Sunday Dispatch on said date having itself printed, published and caused to be printed and published said advertisement, and said print and pictorial illustration entitled "Hake."

And by likewise printing, reprinting and publishing without such authority or right many copies of said print and pictorial illustration entitled "Hack," to wit: forty thousand (40,000) copies as a part of an advertisement for The New Idea in Millinery, in The Columbus Sunday Dispatch, a newspaper of great and wide circulation in the city of Columbus, Ohio, and adjacent territory, on Sunday, October 8, 1911, said defendant company, the owner, proprietor and publisher of said The Columbus Sunday Dispatch, on said date having itself printed, published and caused to be printed and published said advertisement and said print and pictorial illustration entitled "Hack."

And by likewise printing, reprinting and publishing without such authority or right many copies of said print and pictorial illustration entitled "Jury," to wit: forty thousand (40,000) copies as a part of an advertisement for The Columbus Millinery Supply House in The Columbus Sunday Dispatch, a newspaper of great and wide circulation in the city of Columbus, Ohio, and adjacent territory, on Sunday, October 15, 1911, said defendant company, the owner, proprietor and publisher of said The Columbus Sunday Dispatch on said date having itself printed, published and caused to be printed and published said advertisement and said print and pictorial illustration entitled "Jury."

And by likewise printing, reprinting and publishing without such authority or right so to do from it many copies of said print and pictorial illustration entitled "Jury," to wit: thirty-five (35,000) thousand copies as a part of an advertisement for The Max H. Rieser Company in The Columbus Evening Dispatch, a newspaper of great and wide circulation in the city of Columbus, Ohio, and adjacent territory on Friday, November 10, 1911, said defendant company, the owner, proprietor and publisher of said The Columbus Evening Dispatch, on said date having itself printed, published and caused to be printed and published said advertisement and said print and pictorial illustration entitled "Jury."

V. By the use of said prints and pictorial illustrations in such advertisements and publications and by infringing upon L. A. Westermann Company's copyrights as aforesaid The Dispatch Printing Company damaged L. A. Westermann Company in the sum of thirty-five thousand dollars ($35,000).

VI. On August 2, 1912, the bill in equity herein was filed in the office of the clerk of the District Court of United States for the Southern District of Ohio, Eastern Division.

VII. The Ditspatch Printing Company interposed an answer stating that it is and was at all times referred to a corporation duly created and existing under and by virtue of the laws of the state of Ohio and a citizen of said state; and that the L. A. Westermann Company was and is a corporation as averred in said bill and a citizen of the state of New York; that said Dispatch Printing Company was and is engaged in the publication of a daily newspaper printed and published in city of Co-

lumbus, and having a large circulation throughout said city and state of Ohio and that in publication of said newspaper it received and published for profit numerous advertisements. It denied that it had infringed any copyright of the petitioner and denied that the L. A. Westermann Company was in any manner damaged by any act or publication made by The Dispatch Printing Company in said newspaper.

VIII. Prior to August 4, 1913, the above suit came on for trial before the Hon. John Sater, district judge of the Southern District of Ohio, Eastern Division, who on or about the fourth day of August, 1913, filed his decision, in which he found in favor of petitioner and against the respondent as to all the infringements set forth in the bill of complaint and that L. A. Westermann Company was entitled to recovery against The Dispatch Printing Company upon each of the several causes of action in the bill of complaint for the sum of $10.00 for and on account of the publication of the matter as therein set forth. To which finding of the court that the petitioner was entitled to recover only $10.00 on each of said infringements and not entitled to recover not less than $250.00 nor more than $5000.00 for each of said infringements it excepted. The court further found that the complainant was entitled to an injunction as prayed for.

IX. On April 30, 1914, petitioner was granted a writ of error by said Honorable John E. Sater, district judge for the Southern District of Ohio, Eastern Division. Petitioner also on the same date filed its petition on appeal to the United States Circuit Court of Appeals for the Sixth District; and it was ordered that a certified transcript of the record and all proceedings in said case and

forthwith transmitted to the said United States Circuit Court of Appeals.

X. A certified transcript of the record and all proceedings in the case was duly so transmitted to said United States Circuit Court of Appeals; and on the eighth day of February, 1916, the appeal by the petitioner and the writ of error, from that part of said decree it limited the recovery of petitioner for damages to the sum of $10.00 on each of said infringements, came on to be heard, was argued by counsel for both parties before Judges Warrington and Dennison, circuit judges, and Killits, district judge, and thereafter, on the sixteenth day of June, 1916, said Circuit Court of Appeals rendered and filed its opinion and decision written by Judge Dennison, which among other things held that respondent had infringed upon the copyrights of petitioner, but also held that all of the cuts here involved related to a single subject, viz., fashions for women's wear for a single season; that the constituent parts of such a subject are, obviously and necessarily, closely related; that they comprise a unitary object and effect; the aim must be to meet the tastes of women collectively as well as separately. The decision also held that petitioner had united and tied together all its six separately copyrighted cuts as completely as if it had published them only in one catalogue or one book; they had done this, so far as this case is concerned, by uniting them in a season's service which it had sold exclusively for Columbus Morehouse and that its entire business enterprise protected by copyrights was represented in Columbus by its Morehouse contract, that its right, which was involved and which was impaired, was the exclusive right to pub-

lish in Columbus this group of pictures for this season; and this was in substantial effect one right; that the defendant newspaper published on several days several items of this group, but these publications were all incidents of one course of conduct; they all occurred within a short time; they ceased as soon as complaint was made. The court said, "We think it reasonable to say that within the purview of this minimum damage clause they constituted one infringement."

Said opinion and decision reversed the decree of the District Court and remanded the cause with instructions to enter a decree for petitioner for $250.00 damages and costs and the attorney fee already fixed. The opinion further stated that the court thus definitely directed the precise decree to be entered below in order that no lack of finality in its decree might embrace any effort to take the opinion of the Supreme Court; that they had considered certifying the questions but had found their doubts hardly sufficient to justify this course. The decree was entered accordingly.

XI. The questions and propositions of law involved in this case are substantially as follows:

I. Does the publication by the respondent of seven advertisements for five Columbus retailers other than the one holding the franchise for the Westermann sketches, in each one of which seven advertisements there was reproduced one of the copyrighted sketches, no sketch being used twice, and said publication being on different dates and at intervals from September 19 to November 10, constitute seven infringements or a single infringement?

II. Does the copyright law of 1909, Section 25, permit the publication in a single season but on different dates

extending from September 19 to November 10, of different copyright sketches to be treated as a single act of infringement?

III. May the acts of the respondent consisting of the publication of seven separately copyrighted sketches on seven different dates, extending from September 19 to November 10 be considered as constituting a connected and unitary invasion of the proprietor's rights and consequently a single infringement of the copyrights?

The meaning and scope of the copyright law was duly argued in the District Court and in the Circuit Court of Appeals, but in both courts counsel on each side assumed that if the petitioner was entitled to recovery it was entitled to recovery for seven separate infringements. The first intimation of an interpretation given which treats the acts complained of as a single infringement was set out in the opinion of the Circuit Court of Appeals.

XII. And your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of certiorari for the following reasons, among others:

I. Because the questions of law involved herein have not been passed upon by this court.

II. Because the public interests and the interests of jurisprudence require the decision of this court upon the question of law involved herein.

III. Because in view of the large number of persons procuring copyrights and the fact that their use is a question of daily importance in the publication of daily newspapers, said questions are sufficient general, national and material importance and interest as to make it necessary that they should be determined by a court of last resort.

IV. Because attorneys on both sides assumed in presentation of case and argument that if there was any infringement there were seven cases or instances of infringement, and the District Court so held.

V. Because the first suggestion that there was but a single infringement came with the decision of the Circuit Court of Appeals and that court had such doubts upon the questions that they considered certifying them to the Supreme Court in the United States.

Wherefore your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

L. A. WESTERMAN COMPANY.
CURTIS C. WILLIAMS,
SIMEON NASH,
Petitioners' Attorneys.

State of Ohio, Southern District, Eastern Division, Franklin County, ss.:

Curtis C. Williams, being duly sworn, says that the petitioner is a corporation and that he is the attorney for said corporation duly authorized in the premises; that he is familiar with the allegations contained in the foregoing petition; that said petition is true to his own knowledge, information and belief; that his knowledge is derived from the record in this case, from investigation and from what has taken place in his presence and hearing in the court in which the action has been heard.

CURTIS C. WILLIAMS.

Sworn to before me and subscribed in my presence this seventh day of October, 1916.

HUGH K. MARTIN,
Notary Public.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this court.

CURTIS C. WILLIAMS,
Counsellor for Petitioner.

Supreme Court of the United States of America.

In the Matter of the Petition of L. A. Westermann Company for a Writ of Certiorari Directed to the Circuit Court of Appeals for the ~~Second~~ Sixth Circuit to Bring Before the Supreme Court the Case of L. A. Westermann Company, Petitioner, Against The Dispatch Printing Company, Respondent.

And now comes the petitioner above named by Curtis C. Williams, its counsel, attorney, and moves the court, upon a certified copy of the transcript of the record herein, and upon the annexed petition sworn to the seventh day of October, 1916, for a writ of certiorari directed to the Circuit Court of Appeals for the ~~Second~~ Sixth Circuit to bring before this Honorable Court the case of L. A. Westermann Company, petitioner, against The Dispatch Printing Company, respondent, recently decided by the Circuit Court of Appeals of the United States for the Sixth Circuit, for such proceedings therein as to this court may seem just; and for such other and further relief in the premises as may be just.

CURTIS C. WILLIAMS,
Counsellor for Petitioner.

Supreme Court of the United States of America.

In the Matter of the Petition of L. A. Westermann Company for a Writ of Certiorari Directed to the Circuit Court of Appeals for the Sixth Circuit to Bring Before the Supreme Court the Case of L. A. Westermann Company, Petitioner, Against The Dispatch Printing Company, Respondent.

Sir: Please take notice that upon a certified copy of the transcript of the record herein and upon the annexed petition of L. A. Westermann Company, sworn to the seventh day of October, 1916, I shall move the motion hereto annexed before the Supreme Court of the United States at the capitol in the city of Washington, District of Columbia, on Monday, the thirtieth day of October, 1916, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dated Columbus, Ohio, Oct. 7, 1916.

Yours,

CURTIS C. WILLIAMS,
SIMEON NASH,
Attorneys and Counsel for Petitioner.

To Smith Bennett, Esq., Counsel for Respondent, and to The Dispatch Printing Company:

I acknowledge receipt of the above notice this ninth day of October, 1916.

SMITH W. BENNETT.
Attorney for Respondent.

BRIEF.

The questions of law involved in this case have not been passed upon by this court. The Copyright Law under which the case was begun and tried was enacted March 4, 1909 (35 Stat. L., 1075). Section 25 prescribes the amount of damages which may be awarded for an infringement. We have not been able to find any case in which the Supreme Court has construed this section, and the present case is the only one in which any Circuit Court of Appeals appears to have given it an interpretation.

Public interests and the interests of jurisprudence require the decision of this court. Large numbers of persons are constantly procuring copyrights of sketches, cuts, pictures and other matter which find their way into the columns of the daily newspapers, and the circumstances under which the same may be used by such newspapers is of great general interest and material importance alike to the holders of copyrights, the newspapers and the public.

The Westermann service and other sketch services are used very generally among the larger newspapers of the country. All the great newspapers and the producers of all the numerous copyrighted drawings, sketches and other pictures are deeply concerned in knowing the exact scope of this law. An examination of the decision of the District Court and the written argument of attorneys on both sides will disclose that they all assume that if there was any infringement there are seven cases or instances of infringement, while the

decision of the Circuit Court of Appeals finds that there is but one.

The Columbus Dispatch is a newspaper with a large circulation and is said to be recognized as one of the great advertising mediums of the country.

In such a newspaper the rates of advertising are higher and the value of illustrated advertisements consequently increased. As the value of such advertisements increase so the measure of damage or injury by infringement of copyright is increased. A large advertisement in such a newspaper may cost many hundreds of dollars and if the sketch or illustration used be an infringement such wrongful publication correspondingly damages the proprietor of the copyright. In a very few weeks many thousands of dollars of injury may thus be sustained.

It is either admitted or has been found by two courts that (1) each of the six sketches in question were copyrighted, (2) that each copyright was a separate and distinct act by the L. A. Westermann Company, (3) that six separate and distinct copyrighted pictures were published in the Columbus Dispatch on six separate dates, (4) that six of these publications were in a separate issue of said newspaper on a day different from the publication of any of the other copyrighted pictures, and (5) that one of these copyrighted pictures or sketches was published on two distinct dates, namely, October 15th, and November 10th, and for two different Dispatch advertisers, and (6) that the Columbus Dispatch in so printing and publishing each of these copyrighted pictures infringed upon the rights of the plaintiff.

The Circuit Court of Appeals stated that "we see no escape from the application of the $250.00 minimum in a case like this." They also stated that not only does the typical copyright infringement, if not every one, involve indirect damages almost sure to be considerable, but in a few cases would one sum of $250.00 more than compensate plaintiff for his time, trouble and expense in detecting, following up and prosecuting an infringement. But the Circuit Court of Appeals took the view that "the conduct of the defendant in this case constituted a connected and fairly unitary invasion of the proprietor's rights." They discuss the case of a book or musical composition and also the use of a catalogue of cuts or prints illustrating the products of a furniture manufacturer. No one of these cases can be said to be comparable to that of a newspaper infringing in the manner in which the infringement occurred in the case under consideration. Westermann's sketches were not all of a single subject but of various subjects. The cuts were not a part of a single scheme or plan but covered a wide field, and the various pictures or sketches were copyrighted separately and any one of them could be sold and published independently of the others. The fact that all were sold to Morehouse was a **mere incident.** They might have been divided up and sold to **several** customers, each customer using pictures or sketches different from the others. In the case of a book the copyrighting of the separate chapters of a book would be the copyrighting of the different parts of the complete entity. A chapter might be wholly incomplete when standing alone, having no values. Each one of the Westermann pictures stood alone as a product

separately copyrighted and having its own intrinsic value. In the case of a catalogue all of the separate pictures or drawings are combined and published as a single production.

The Circuit Court of Appeals in discussing the question of whether there are seven separate infringements states that "the damages would have been irrationally increased. We believe Congress meant no such result." We fail to see the reason for this conclusion. To say that **seven separate publications** on as many different days of **separately copyrighted** pictures of the plaintiff would constitute a single infringement would mean that the law practically gave immunity to large newspapers in the use of such sketches and cuts, since the payment of $250.00 would be no compensation for the great damage thereby wrought to the copyright proprietor. If the Dispatch could publish six sketches or pictures and treat those acts as a single infringement there would be nothing to prevent the printing of a different Westermann sketch every day during the entire season, if there should be that many sketches made during the season, and treating them all as a single infringement. Nor is there anything to prevent them from continuously printing or publishing such cuts through a number of seasons and having them all treated as a single infringement. If the Act of Congress in question had been in language such as that the literal meaning of it would have implied a penalty of $250.00 for each copy of the newspaper in which the copyrighted sketch or picture had appeared then it might well be said that the damages would have been irrationally increased. But by giving the law the interpretation for which we contend

hundreds of thousands of copies of a single issue of a newspaper may contain an infringed copyrighted picture but the proprietor would have but a single right of recovery. When the publication covers different dates and different copyrighted pictures come to be considered a wholly different situation arises.

There are cartoonists who are continuously producing newspaper pictures and whose income from their profession is said to amount to a very large sum every year. Some newspapers are said to pay many thousands of dollars for such cartoons. Suppose that a metropolitan daily should begin and continue through a period of weeks or months the reproduction of the cartoons for which one of its rivals had paid some large sum. In such instance the act of Congress certainly would not restrict the copyright proprietor to a recovery on a single infringement.

There cannot be said to be any composite or grouped right in this case. The publications were on **separate days**. The **copyrights were each separate. Different sketches** were published on all except two days.

Suppose that these copyrighted sketches or pictures had been owned by seven separate proprietors. Could anybody then be heard to say that there was not seven separate rights of action? Or suppose that this Westermann service had been used by seven separate newspaper publishing companies but they had all used the service for which Morehouse had contracted and it had all been used the same year, then could there be any question made but that the plaintiff would have a separate cause of action against each of the parties so infringing, notwithstanding the fact that the number of

pictures published were the same as in this case. Or suppose that after the pictures or sketches had been copyrighted the copyright proprietor had sold the copyright of such sketch or picture to six different persons, could there be any question but that each of the six persons would have a separate right of action for such infringement? Or suppose further that after the publication by the defendant of the copyrighted sketches or pictures L. A. Westermann Company had sold each of said copyrights of said sketches or pictures, together with all rights of action for infringement on the same, to seven different persons, could there be any question but that each of such persons would have a right of action against the defendant? We ask counsel for respondent to give the answer to these questions.

Suppose that the Westermann Company had brought an action against the Dispatch Publishing Company on September 19th and before the 1st day of November of the same year had succeeded in having the case heard and disposed of and recovered the minimum of such infringement; then suppose that on the 15th day of November the Dispatch published another one of the Westermann pictures and the plaintiff instituted a new action for such publication, would the Dispatch company be heard to plead the former judgment in bar? The Circuit Court of Appeals recognizes the force of this argument when it says that the plaintiff might be able to bring several suits simultaneously in different jurisdictions and thus escape consolidation, but that court said that there will be time to meet such a problem when it arises. The Circuit Court of Appeals says that the plaintiff united and tied together his six sepa-

rately copyrighted cuts by uniting them in a season's service which he sold exclusively to Columbus for Morehouse. But there is nothing to show that this service was not also sold to other parties in cities other than Columbus where the Columbus Dispatch circulates and is read. As a matter of fact the Westermann service is sold in a number of other places where this newspaper is circulated, and this fact, too, emphasizes the substantial damages which plaintiff has sustained by the course of the Dispatch in thus publishing the cuts. The right which was involved and impaired was a right which affected every subscriber and user of the Westermann service in the territory through which the newspaper circulated. The copyright law, given its literal interpretation, is not unreasonable or irrational, or excessive in the amount of damages assessed. But to give it an interpretation that would mean that the seven separate publications in question constituted a single infringement would be to give to the defendant license to practically ignore the proprietor's rights by simply paying a nominal sum as damages. The plaintiff is a New York corporation, the defendant is an Ohio corporation. In order for plaintiff to protect its rights it became necessary for it to come to Columbus and institute an action, and it is not reasonable to assume that Congress ever contemplated that the plaintiff could have such a hardship imposed upon it as has been in this case and it be possible to limit it in its recovery on a series of publications to the paltry sum of $250.00

Respectfully submitted,

CURTIS C. WILLIAMS,

SIMEON NASH,

Attorneys for Petitioner.

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Supreme Court, U. S.
FILED
APR 28 1916
JAMES D. MAHER,
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Supreme Court of the United States

OCTOBER TERM 1916.

No. [redacted]50

L. A. WESTERMANN COMPANY,
Plaintiff in Error,

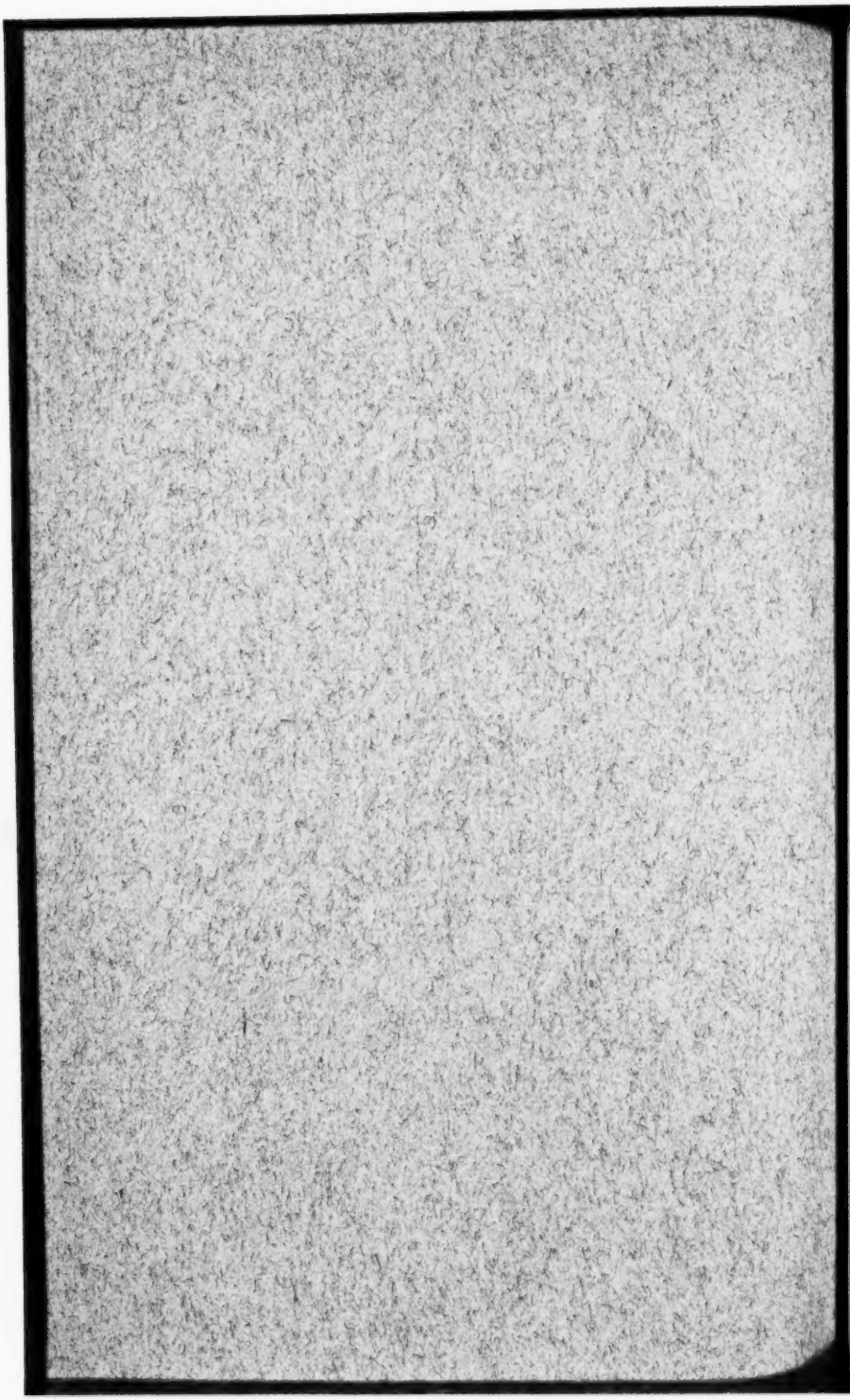
vs.

THE DISPATCH PRINTING COMPANY,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

CURTIS C. WILLIAMS,
SIMEON NASH,
Solicitors for Plaintiff in Error.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio



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Supreme Court of the United States

OCTOBER TERM 1916.

No. 742

L. A. WESTERMANN COMPANY,
Plaintiff in Error,

vs.

THE DISPATCH PRINTING COMPANY,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT.

The petition in this case and brief in support of same fully set out the facts and the plaintiff in error's reasons for asking that the judgment and decree of the United States Circuit Court of Appeals for the Sixth District be vacated and that this court order and direct a judgment and decree conforming to the provisions of Section 25 of the Copyright Law of March 4, 1909 (35 Stat. L. 1075).

The L. A. Westermann Company is engaged in the business of furnishing to its subscribers artistic copyrighted cuts which are used in the preparation of adver-

tisements. A number of these copyrighted cuts appeared in the newspaper published by the defendant at Columbus, Ohio, in the advertisements of advertisers who were not subscribers to the service of the L. A. Westermann Company. Seven of such infringements are complained of, the original copyright print and the corresponding infringement being attached to the bill of complaint in each instance. These exhibits to the bill of complaint are reproduced following page 6 of the Record, and also, following page 42 of said Record.

Numerous questions were made at the time of the trial in the lower court as to whether or not these prints were copyrightable, as to whether or not the copyright was properly proven, as to whether or not the defendant could escape liability because it had no actual notice of the copyright and acted in good faith, reliance being had upon Section 20 of the copyright act of March 4, 1909, and as to various other minor matters. However all of these questions were resolved in favor of the complainant by the lower courts as will appear from opinions (Transcript of Record pp. 10-13 and pp. 51-59).

In each of the lower courts the plaintiff in error recovered a judgment and decree, but likewise in each of those courts the plaintiff in error took the view that in assessing and awarding the judgment for damages those courts violated the clear provision of the act which recites that in **no such case** shall such damages "exceed the sum of five thousand dollars nor be less than two hundred fifty dollars". The District Court ignored this provision and awarded judgment in the sum of ten dollars for and on account of each infringement set out in the petition. The Circuit Court of Appeals found that they were bound by a minimum fixed by Section 25, but found that instead of their having been seven

separate and distinct rights of recovery that there was but a single infringement. This conclusion was in conflict with the views of counsel on both sides. At no time prior to the decision of the Circuit Court of Appeals had the defendant denied but that if the plaintiff was entitled to recovery at all it was entitled to recovery on at least seven separate infringements. Plaintiff in error is asking this court to adopt the view of the District Court that there was at least seven separate infringements and the view of the Court of Appeals that the minimum award should be not less than two hundred fifty dollars.

The award should not be regarded as a penalty. Throughout the discussion of this case the last clause of Section 25 is treated as if without force or effect, by counsel for defendant. The arguments in regard to proofs of damages sustained by plaintiff in error on the one hand, or profits by defendant in error on the other, are all founded upon the theory that the court is to look to the nature and extent of the injuries sustained. In the very nature of things damages for the violations of a copyright are of such a nature that it is many times impossible to procure competent evidence on that subject.

> "The whole course of the copyright law shows a recognition of the difficulty of making legal proof of damages and, in substituting for rigid penalties the discretionary power of the court, it was intended that a plaintiff should not fail for lack of proof. Gross v. Van Dyke Gravure Co., 230 Fed. 412.

L. A. Westermann Co. had the right to do and did the very thing that act authorized, namely, proved the violation by defendant in error and then relied upon provision regarding maximum minimum damages.

The act imposes upon the court the duty of fixing from the evidence the measure of damages and restricts the court as to the minimum and maximum amount of such damages. Proof of the violation presumes injury. In addition the court had before it evidence of the very large circulation which the defendant's publication had at the time of the issues in which the violations occurred.

THE ARGUMENT.

1. The Statute Under Which the Question of the Amount of Damages Arises.

The question as to the amount of damages arises under sub-section (b) of Section 25 of the copyright Act of March 4, 1909, 35 Stat. L. 1081, U. S. Comp. Stat. Supp., 1911, page 1480; Fed. Stat. Ann. Supp. 1909, page 87, which said Section 25, so far as material, we quote at length.

> "That if any person shall infringe in the copyright in any work protected under the copyright laws of the United States such person shall be liable:
>
> (a) To an injunction restraining such infringement;
>
> (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profit the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its dicretion allow the amount as hereinafter stated, but in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty;
>
> First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employes;

Second. In the case of any work enumerated in section five of this act, except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employes;

Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical, or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance."

2. Facts Essential to the Consideration of the Question of Damages.

Following out the provisions of section 25 just quoted, and in order to avail itself of the benefit of sub-paragraph (b) of said section, the plaintiff fixed its damages for each infringement at the maximum sum provided by the statute, namely five thousand ($5000) dollars, and in its prayer asked that the defendant might be decreed;—

"To pay to the plaintiff, in lieu of actual damages and profits, damages in the sum of thirty-five thousand ($35,000) dollars as provided by the act of Congress." (See record, page 6.)

The amount thus prayed for, $35,000, is made up of $5000 for each of the seven infringements complained of.

It was shown by the testimony of Lewis Aurel Westermann (see record, page 26-32), that each customer of the complainant by contract had the exclusive right to the use of the Westermann illustrations in his own locality. The value of the Westermann service as it is called, that is, the furnishing of these up-to-date cuts for advertising purposes, depends entirely upon their exclusiveness. If they are not exclusive the service is

valueless to the customer and the business conducted by the complainant is ruined. It therefore is obvious that any infringement of these copyrighted cuts would result in damage to the complainant, because it would take away from the service of the complainant the one thing which made that service valuable, namely, its exclusiveness.

Mr. Westermann himself, the president of the complainant company, testified that it was impossible for him by any means to calculate in dollars and cents the amount of damages which had been sustained.

Not only does Mr. Westermann give this direct testimany as to his inability to calculate or measure the amount of damages but it is quite apparent from the nature of the business carried on that, although damage must necessarily accrue, it is practically impossible to calculate it in dollars and cents.

As illustrating the effect upon the business of the L. A. Westermann Company of these infringements of these copyrights we call especial attention to one of the infringements complained of. At page 88 of the record appears Exhibit F-1, which is a reproduction of the print entitled "Jury," as it was published in the Columbus Sunday Dispatch of that date in the advertisement of The Morehouse-Martens Company with the copyright notice thereon. The Morehouse-Martens Company was the subscriber of the Westermann service at Columbus, Ohio. On this same date and in the same identical paper, the same cut, "Jury," appears in the advertisement of The Columbus Millinery Supply House, without the copyright notice, and this advertisement is reproduced as Exhibit FF attached to the bill of complaint at page 18 of the record.

3. The Copyright Act Provides a Minimum which must be Allowed.

Section 25 of the copyright act requires the minimum of damages specified, towit, $250, to be awarded, in case the copyright proprietor elects that remedy. It was to meet just such a case as that at bar that the provision was enacted. The determination of the question depends upon the construction of section 25.

The statute reads that the infringer shall be liable to pay the copyright proprietor

> (a) Actual damages as well as all the profits which the infringer shall have made; (b) or in lieu of actual damages and profits such damages as to the court shall appear to be just, within the minimum and maximum limits.

The District Court decided the case upon the theory that it was for the court to choose between the two forms of relief. The statute does not so state, and there is nothing in the phraseology warranting any such construction.

4. The history of remedies allowed for infringement of copyrights and previous decisions show that the plaintiff is the one to choose between the remedies.

The act of March 4, 1909, of which Section 25 forms a part, is entitled, "An act to amend and consolidate the acts respecting copyrights." It amended previous provisions of law in many particulars and brought all of the different classes of copyrights together in one codification. Pror to this act there had been several different forms of remedy allowed for the several classes of copyright.

Section 4968, R. S. (U. S. Comp. Stat., 1901, page 3412), 1-953, provided for a **qui tam** action for the recovery of a penalty for the false use of a copyright notice.

Section 4964, R. S. (U. S. Comp. Stat., 1901, page 3413), provided for the recovery of damages in a civil action in the case of copyright books, and the forfeiture of all infringing copies.

Section 4965, R. S. (U. S. Comp. Stat., 1901, page 3414), refers to maps, charts, dramatic and musical compositions, and other works, and provides that the infringer shall forfeit to the proprietor all plates, the sum of $1 for every sheet found in his possession and $10 in the case of a painting or statue. A minimum of $100 and a maximum of $5000 is fixed for copyright photographs of objects not fine arts. In the case of fine arts the minimum is $250 and the maximum $10,000. These recoveries were clearly penalties, one-half being for the use of the copyright proprietor and the other half for the use of the United States.

R. S., 4966 (U. S. Comp. Stat., 1901, page 3415), to which we will refer in more detail later, applies to the **performance** of a dramatic or musical composition, and provides that the infringer shall be liable for damages, in such sum as to the court shall appear to be just, with a minimum of $100 for the first and $50 for every subsequent performance, no maximum being specified.

R. S., 4970 (U. S. Comp. Stat., 1901, page 3416), also gives general jurisdiction to grant injunctions, according to the course and principles of equity. Under this latter section it was held that when jurisdiction in equity is secured by an action for injunction, jurisdiction is also acquired to grant **an accountng of profits.** Stevens vs. Gladding, 17 How. (U. S.), 447, 15 L. Ed., 155. In this case the plaintiff asked for an injunction, and

for certain penalties imposed by the copyright act and also for general relief. The court rejected the prayer for the penalties, but granted an injunction, and **an account of profits** under the prayer for general relief. We quote the following from the opinion:

> "There is nothing in this act of 1819 which extends the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended, that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights. The prayer of this bill for the penalties must therefore be rejected."
>
> "The remaining question is, whether there ought to be a decree for an account of the profits. The complainant has not prayed for such an account, nor have the defendants stated one in their answer; but the bill does pray for the general relief."
>
> "The right to an account of profits is incident to the right of an injunction, in copy and patent right cases." (From opinion, 17 How., 455, 15 L. Ed., 158.)

This case was followed in the case of Callaghan vs. Myers, 128 U. S., 617, 663, 32 L. Ed., 547, 561, in which it was held that in an action in equity no relief could be granted in the way of forfeiture of infringing books, because such relief could be granted only in an action at law. We refer to this case because it shows the nature of the jurisdiction which equity had prior to the act of March 4, 1909.

None of these remedies, provided by the statutes to which we have referred, unless it be R. S., 4966, covering dramatic performances, have any close similarity to Section 25. The penalties provided by Section 4965, with their maximum and minimum provisions, are somewhat similar, but yet they are entirely different because a true penalty is there imposed, half of which goes to the

United States. Section 4965 seems to have been followed in fixing the schedule of so much per sheet, etc.

In the case of Section 4966 we find an action which is really one for damages, containing a minimum but no maximum provision. This provides a minimum of $100 for the first and $50 for every subsequent performance of an infringement of a dramatic or a musical ecomposition. It has been held that this is a true action for damages and not a penalty. Brady vs. Daly, 175 U. S., 148, 44 L. Ed., 109.

The pertinent part of R. S., 4966, is as follows:

> "Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than $100 for the first and $50 for every subsequent performance as to the court shall appear to be just." (U. S. Rev. Stat., §4966; 2 Fed. Stat. Ann., 269; Supp. Rev. Stat. U. S., Vol. 3, page 536.)

The Supreme Court held that actual damages in such sum as the court found just might be recovered, but that **in any event** the **minimum could be recovered.** The reason for the enactment of the statute is shown to be the furnishing of **an effective remedy** to a **proprietor who was unable to bring direct evidence to show what the actual damages were.** The history of R. S., 4966, is given in the opinion. We quote the following at length from the opinion because it shows the purpose of the enactment of R. S., 4966, and equally we say the intent of Congress in enacting Section 25 of the present law:

> "These statutes, it will be perceived, all use the word 'damages' when referring to the wrongful production of a dramatic composition. No word of for-

feiture or penalty is to be found in them on that subject. It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such wrong, and to grant to the proprietor the right to recover the damages which he has sustained therefrom.

"The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. In the face of the difficulty of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. The statute itself does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. The person wrongfully performing or representing a dramatic composition is, in the words of the statute, 'liable for damages therefor.' This means all the damages that are the direct result of his wrongful act. The further provision in the statute, that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one. The whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person in case the proprietor himself neglects to sue. It has nothing in the nature of **qui tam** action about it, and we think it provides for the recovery of neither a penalty nor a forfeiture.

"If, upon the trial of such an action, the court should find from the evidence that the plaintiff had, in fact, sustained a greater amount than the minimum sum of damages provided in the statute, and should direct judgment in his favor for the sum so proved, would that judgment be for a penalty? On the contrary it would be for the actual amount of

damages which the evidence showed had been sustained by the plaintiff, and his recovery of that sum would be the recovery provided by the law for the wrong which he had suffered. When the evidence does not warrant a greater than the minimum recovery, the amount named in the statute still constitutes the remedy provided by the law, which plaintiff can pursue." (From the opinion, 175 U. S., 145-5, 44 L. Ed., 112.)

"Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum amount appears to us to have been fixed because of **the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained.**

"The English statute of 3 & 4 Wm. IV, Chap. 15, entitled, 'An Act to Amend the Laws relating to Dramatic Literary Property', by its 2d section provides that a person who wrongfully produces and represents a dramatic composition 'shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented.'

"In Chatterton v. Cave, L. R., 3 App. Cas., 483, 492, the court in speaking of this provision for damages said that the same 'was no doubt fixed, because of the difficulty of proving with definiteness what amount of actual damage had been sustained by perhaps a single performance at a provincial theater of a work belonging to a plaintiff, while at the same time his work might be seriously depreciated if he did not establish his right as against all those who infringed upon it.' This does not look as if that statute were regarded by the English courts as one of a penal nature, but, on the contrary, as one of a remedial kind providing for the recovery of the damages sustained by the plaintiff, and providing for the recovery of a minimum sum for the reason,

as stated by the court, of the difficulty of proving with definiteness in all cases the amount of damages which plaintiff really had suffered." (From the opinion, 175 U. S., 152; 44 L. Ed., 113.)

Thus we see that prior to the act of Mach 4, 1909, in one class of copyright infringements at least, there was a right to recover actual damages with a minimum recovery in any event. This minimum recovery could be had even though on the evidence before it the court might have thought, as the lower court in the case at bar states, that the actual damages did not in fact measure up to the minimum. Nevertheless that was the law as to this class of infringements prior to 1909. **This remedy has now been extended to all copyright matter.**

It may be that in the case of Globe Newspaper Company vs. Walker, 210 U. S., 356, 52 L. Ed., 356, decided June 1, 1908, we find a reason for the bringing together in one section, Section 25 of the present act, of these various remedies for infringement. In this case it was held that the remedies prescribed by statute were exclusive, and that there was no action for general damages for the infringement of a copyrighted map. The only remedy it was held was by injunction, and for the recovery of one-half of the penalty of $1 for each sheet found in the defendant's possession. The court said that the remedy might be inadequate but that it was exclusive. In the following year the act of March 4, 1909, was enacted, and a uniform system of remedies applying to all copyright matter was set forth in Section 25.

In Section 25 we see a mixture of the several remedies theretofore existing. The penalty provision with one-half for the use of the United States is discarded. On the contrary it is expressly provided that the recoveries shall not be regarded as penalties. Actual damages is

retained as found in the statute regarding copyright books, R. S., 4964, profits being also added, as theretofore allowed by the decisions. These damages and profits are coupled, the greater only to be allowed, and by an action in equity, as we show below, page 33. The recovery of such damages as to the court shall appear to be just, as in the case of the performance of copyright dramatic and musical compositions, is retained, but in addition to the minimum provision, the maximum provision of the penalty statute is added, together with a schedule of amounts per sheet or performance as in the penalty statute.

We state above that **profits** is added to the damages theretofore provided for by Section 4964. Profits are nowhere mentioned in any of the statutes prior to 1909. They were taken not from the prior statutes but from the decisions which permitted an accounting of profits in equity, to which we have referred above, the two to be coupled as in the equity remedy of the patent statute. (See below. page —.) So that we see that Section 25 is a compilation of the previous remedies, together with the remedy of an accounting of profits theretofore afforded in equity. These actual damages together with **profits** is afforded in the present act as an equitable remedy, while "such damages as to the court shall appear to be just" within the minimum and maximum limits, is given as an alternative remedy at law.

And here we say is incorporated in the statute a right of election which theretofore existed, namely the right of the proprietor to elect between the enforcement at law of the specific money remedy given by statute, and the accounting of profits in an action in equity.

We have seen above that the statute giving the right to protect the copyright in equity was held to carry with

it the right to an accounting of profits. (See above, page —.) It was held in the case of Brady vs. Daly, 175 U. S., 148, 44 L. Ed., 109, that the proprietor had an election between the accounting of profits in equity, and the money remedy at law for an infringement of a dramatic composition allowed by R. S., 4966, cited above, page 23. This was an action at law based on the performance of a dramatic composition. Prior thereto Daly had brought an equity action in which a perpetual injunction was granted, and a reference had to a master who made no accounting of profits but merely a finding as to how many performances there had been. It was insisted in the subsequent action at law that this constituted an election of an accounting of profits and constituted a bar to the action at law. On this subject the court, per Justice Peckham, says:

> "In view of these facts, we think there was no election of an inconsistent remedy by the plaintiff in the action which would bar him from the maintenance of this action for the recovery of damages under the section of the revised statutes before referred to."
>
> "Conceding that he might in the equity suit have recovered profits if there had been an accounting concerning the same, and that a decree for their recovery, would be a bar to a proceeding under the statute, **yet the plaintiff was not bound** to take such remedy; and when in fact he did not take it, and there was no accounting for profits in the equity suit, no decree made in regard to them and no recovery had, we see nothing to prevent the plaintiff in this action from recovering under the statute the damages which he has sustained by reason of the infringement of his copyright by the defendant." (From the opinion, 175 U. S., 161, 44 L. Ed., 114.)

In Brady vs. Daly no evidence was introduced except as to the number of performances, and on this basis an

allowance of $50 for each performance was made. The case was taken up by the defendant and the judgment affirmed. Before the act of March 4, 1909, therefore, damages in such sum "as to the court shall appear to be just," restricted by the minimum provision as found in R. S., 4966, required the allowance of the minimum even though no evidence was before the court as to the amount of actual damages. Exactly the same language is found in Section 25, as in R. S., 4966, such "damages as to the court shall appear to be just."

Therefore we say that the conclusion follows that prior to 1909 the proprietor had an election between "**profits**" and "**such damages as to the court shall appear to be just,**" the latter not requiring any evidence to sustain the minimum allowance. The linking of the term "**profits**" with damages in the present section, demonstrates that it was the intention of Congress to preserve to the copyright proprietor this right of election between the two remedies. If this is not the proper construction of Section 25 then the proprietor of a dramatic composition is at the mercy of his infringers. If he cannot show by positive evidence that patrons have been kept away from his own authorized performances, or that he himself might have had the play performed in some "**provincial**" theatre, as the English case cited in Brady v. Daly states, then he must content himself with nominal damages, after expensive litigation as the complainant in this case must do. Certainly it was not the intention of Congress to take away this right which had existed since the act of 1856. (See opinion, Brady vs. Daly, 175 U. S., 153, for history of R. S., 4966.)

This is the result of defendant's theory of Section 25 so far as musical compositions are concerned. It is a

step backward in the protection of copyrights. It is also a step backward so far as the protection of those classes of copyrights mentioned in R. S., 4965, is concerned. Prior to 1909 the proprietor did have the right to recover profits or at his election one-half of the penalties provided. Now unless he can bring forward demonstrative evidence of his damages he has no remedy save to enjoin an infringement already accomplished. Surely Congress has not taken such a backward step as this.

5. The First Remedy is Taken from the Patent Statutes and is an Equitable Action.

The report of the House Committee on the present copyright act shows that the first remedy of damages and profits found in Section 25 is borrowed directly from the patent laws and that it is a **purely** equitable remedy.

We quote the following from the report of the Committee on Patents of the House of Representatives recommending the passage of the present copyright act, which report is found in House of Representatives Reports, Sixtieth Congress, Second Session, Volume 1, Report No. 2222, quoting from page 15:

> "Section 25 deals with the matter of civil remedies for infringement of a copyright. Sub-section (a) is merely declaratory of existing law. The provision in Sub-section (b) that in proving profits the plaintiff shall be required to prove sales only, etc., is taken from the existing law relating to trademarks. **The provision that the copyright proprietor may have such damages as well as the profits which the infringer shall have made is substantially the same provision found in Section 4921 of the Revised Statutes relating to remedies for the infringement of patents. The courts have usually construed that to mean that the owner of the patent might have one or the other, whichever was the greater.** As such a

provision was found both in the trade-mark and patent laws, the committee felt that it might be properly included in the copyright laws. **The provision that in lieu of actual damages and profit such damages shall be awarded as shall appear to the court just, not exceeding the sum of $5000, is a modification of existing law, decreasing instead of increasing the amount that may be obtained in this way.** There have been actions brought under the existing law where the penalty would have been $30,000, and under the law now in force regarding certain infringements it is provided that the damages shall not be less than $250 nor more than $10,000. The special limitation as to the amount of damages which may be recovered in the case of a newspaper reproduction of a copyrighted photograph is made because such reproduction has little permanent value or usefulness. A reproduction in this form does not damage the copyright proprietor to as great extent as would the reproduction and sale of copies of the photograph in a different form.

"The first subdivision of the section is, with slight change of phraseology, a re-enactment of existing law. The second subdivision is, as to some of the articles covered, a re-enactment of existing law, but is broadened so as to cover some reproductions not now enumerated in the statute like plastic works of a scientific or technical character, and books, pamphlets, etc. The third subdivision is new, and is intended to give adequate protection against the infringement of the new right of copyright given by Sub-section (c) of Section 1. The fourth is a substantial re-enactment of existing law, which provides that the damages for an infringement of any dramatic or musical composition shall be not less than $100 for the first performance, and $50 for every subsequent performance, but we have modified this provision in the bill by fixing the damages for an infringing performance of a purely musical composition at $10."

The Senate Committee merely reprinted the report of the House Committee as its report. (Senate Reports, Sixtieth Congress, 2nd Session, Volume 1, Report No. 1108.)

Section 25 of the copyright act provides that the infringer shall be liable to pay to the copyright proprietor:

> "Such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement."

The pertinent parts of R. S., 4921 (Fed. Stat. Ann., Vol. 5, page 577, U. S. Comp. Stat., 1901, Vol. 3, page 3395), are as follows:

> "The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions **according to the course and principles of courts of equity**, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction."

Equitable juridiction is granted in the copyright act in the same terms as in the patent act, namely the power to grant injunctions "**according to the course and principles of courts of equity.**" (Section 35 copyright act of March 4, 1909.)

We see then that the equitable jurisdiction under the copyright act is the same as under the patent laws, and that the provisions as to the recovery of damages and profits are in substantially the same language in both acts. It would follow that the decisions under the two acts should be the same, especially in view of the fact that the language of the copyright act is taken directly from the patent act.

It was held in the case of Root vs. Lake Shore and Michigan Railway Company, 105 U. S. (15 Otto), 189,

26 L. Ed., 975, that equity has no jurisdiction to render a naked account of profits against an infringer of a patent. There must be some ground of equitable jurisdiction to give jurisdiction in the first instance, and then the accounting of profits follows from this. The remedy for patent infringements under R. S., 4921, is given only in equity. The remedy at law for damages is given by R. S., 4919, under which the damages are fixed by a verdict of a jury and may be trebled by the court.

It has also been held by the Circuit Court of Appeals, Eighth Circuit, that no action can be had at law for the recovery of profits, and that unless equitable jurisdiction can be secured in some manner, profits cannot be recovered. Brown vs. Lanyon, 78 C. C. A., 528, 148 Fed., 838. (Petition for writ of certiorari denied, 204 U. S., 672; 51 L. Ed., 673.)

It is apparent upon a comparison of Section 25 of the copyright act and R. S., 4921, as well as from the report of the committee quoted above, that the provision has been taken from R. S., 4921. **The damages and the profits go together in both sections and are to be recovered in an equitable action.**

This is undoubtedly true of R. S., 4921, regarding patent infringements and should be equally true of the copyright statute. That the damages and the profits go together is shown in the report of the committee, where they say, referring to the damages and profits:

> "The courts have usually construed that to mean that the owner of the patent might have one or the other, whichever was the greater." (See quotation from report of committee above, page —.)

The statement of the committee in regard to the construction of the patent statute is correct. Tilghman vs.

Proctor, 125 U. S., 135, 31 L. Ed., 664. We quote the following from the opinion:

> "The rule in equity of requiring an infringer to account for the gains and profits which he has made from the use of a patented invention, instead of limiting the recovery to the amount of royalties paid to the patentee by third persons, has been constantly upheld under the provision of the Patent Act of 1870, embodied in the Revised Statutes, which, beside re-enacting the grant of general equity jurisdiction in patent cases, further enacts that 'upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction, and the court shall have the same powers to increase the same in its discretion that are given by this act to increase the damages found by verdicts in actions upon the case;' **and thus expressly affirms the defendant's liability to account for profits, as well as authorizes the court sitting in equity to award and to treble any damages that the plaintiff has sustained in excess of the defendant's profits.** Act of July 8, 1870, Chap. 230, §55, 16 Stat. at L., 206; Rev. Stat., § 4921; Birdsall v. Coolidge, 93 U. S., 64, 69; Marsh v. Seymour, 97 U. S., 348; Root v. R. Co., supra; Goulds Mfg. Co. v. Cowing, 105 U. S., 253; Garretson v. Clark, 111 U. S., 120; Black v. Thorne, 111 U. S., 122; Girdsell v. Shaliol, 112 U. S., 485, 488; Thompson v. Wooster, 114 U. S., 104." (From the opinion, 125 U. S., 148-9, 31 L. Ed., 668.)

In this case the lower court rendered judgment for the damages which happened to be less than the profits, and Supreme Court reversed this with directions to enter judgment for the profits.

The patent law, just as the copyright law, at first made no mention of profits, but profits were allowed whenever equitable jurisdiction attached. (See Stevens v. Glad-

ding, 17 How. (U. S.), 447. Cited above, page 21.) In 1870 the patent law was amended so as to expressly authorize the allowance not only of profits but also of damages in equity. In 1909 the same amendment was incorporated in Section 25 of the copyright act.

Under the construction which had theretofore been given to R. S., 4921, the damages and profits mentioned in that section are undoubtedly the damages and profits which are allowed in equity, damages only being allowed in case there is an excess of damages over profits. **If this was what this language meant in the patent law it certainly means the same thing in the copyright act.** Irrespective of what we find from the report of the committee in the copyright act of 1909, it must necessarily be held that that part of Section 25 which refers to damages and profits affords a remedy in equity, **because profits are allowed only in equity, because they had prior to the act of 1909 been allowed only in equity, and because from the very nature of things profits can only be calculated and allowed in equity upon an accounting.**

This demonstrates that the first remedy provided by subsection (b) of Section 25, is an equitable action similar to the equitable action under the patent laws for damages and profits.

It is equally certain from the authorities which we have cited that the action for the alternative remedy "such damages as to the court shall appear to be just" is an action at law. This is demonstrated by the case of Brady vs. Daly, 175 U. S., 148; 44 L. Ed., 109, cited above at page — and page —.

And from the facts that the first remedy is a remedy in equity which could never be granted unless equitable jurisdiction had already attached upon some other ground, and that the alternative remedy is an action at

law, it necessarily follows that it is not for the court, but for the copyright proprietor to determine which remedy he shall pursue. The court is not to determine for the copyright proprietor whether he shall sue at law or in equity. This is determined by the proprietor when he frames and files his petition.

Another matter which shows that it was the intention of Congress that the proprietor was to have the election between the two forms of remedy is pointed out by the report of the committee. In the second paragraph of the quotation from the report of the committee, given above at page —, the report states:

> "The third subdivision is new, and is intended to give adequate protection against the infringement of the new right of copyright given by subsection (c) of Section 1."

Section 1 in sub-section (c) grants to the copyright proprietor the exclusive right:

> "To deliver or authorize the delivery of the copyrighted work in public for profit if it be a lecture, sermon, address, or similar production."

Subdivision three of sub-section (b) of Section 25, a part of the schedule of prices for infringements is as follows:

> "In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery."

The committee has stated that it was their purpose to give adequate protection to this new right. If the proprietor is not entitled to demand the alternative remedy under the restrictions of the minimum and maximum provisions, how did the committee assist the proprietor in protecting his rights. If his only guarantee is such damages as he may be able to prove by direct

evidence, he does not have the protection which undoubtedly the committee though was being guaranteed to him.

Another consideration shows the fallacy of the judgment in the District Court. From the authorities just cited, it is apparent that the first remedy consists not only in damages, but in damages and profits, the larger being granted. Nevertheless that court in the case at bar went ahead, acting clearly under the first remedy because it did not observe the restrictions upon the second remedy, and rendered judgment for nominal damages **without any accounting before the court or a master.** Of course, to this counsel for defendant will answer that we did not ask for an accounting, and when they make that answer they will demonstrate that the plaintiff was asking for and was entitled to, not the first remedy, but the alternative remedy with its benefits.

6. Plaintiff Elected to Pursue the Remedy at Law for 'Such Damages as to the Court shall Appear to be Just' and is Entitled to at Least the Minimum.

An examination of the bill of complaint or petition, whichever we may choose to call it, clearly shows that the plaintiff has elected to recover, in lieu of actual damages and profits, damages to be fixed by the court within the maximum and minimum provision. This is shown by the amount of damages asked for and the form of the prayer. The pertinent parts of the prayer are as follows:

> "And your orator further prays that the defendand may be restrained * * *; that the said defendant may be decreed to render an account of all of the said prints and pictorial illustrations which have been published, and of the said newspapers in which the same have been published, and to pay to the

> plaintiff in lieu of actual damages and profits, damages in the sum of thirty-five thousand ($35,000) dollars as provided by the act of Congress; * * *." (Record, page 6.)

This is certainly an election. We were limited to a recovery of five thousand dollars for each infringement after making this prayer. Could the plaintiff after making this prayer have changed position and insisted upon damages and an accounting of profits if it had developed that the latter would warrant a larger recovery. Certainly not **The reverse is also true. Having made this election we are entitled to the benefit of it.**

There is one decision by a District Court under Section 25 which is just the reverse of the present case, it being held that the plaintiff was bound by an election made by praying for damages and an accounting of profits. Huebsch vs. Crist Company, 209 Fed., 885, decided by the District Court, Northern District of New York, January 2, 1914.

The bill in this case prayed as follows:

> "For an 'account of the profits arising from the sale of said piratical leaflet as far as any profits have been made,' and that defendant be required to pay over to your orator such damages as your orator may have suffered due to the infringement as well as all profits which the defendant, the infringer, shall have made from the infringement, in accordance with the copyright law' and also costs, etc." (From the opinion, 209 Fed., 893.)

The court then goes on to consider the question of recovery and grants a reference for an accounting and refuses to fix damages itself, relying upon some of the cases which we have cited. The decision is made under Section 25, the court expressly holding that the new statute applied to the case although the copyright was secured prior to 1909.

"I think the complainant has made a case which entitled him to the relief prayed for, an accounting etc., and it will be referred to a master to take and state the account of profits and damages unless the parties agree. The damages, etc., cannot be large. The leaflet sold for 3 cents per copy; while the book sold for $1.60 per copy, and it cannot be inferred that the sale of a leaflet prevented a sale of a copy of the book. The complainant is also entitled to full costs, and a reasonable attorney's fee will be added on the coming in of the master's report. Section 40, Act of March 4, 1909. As this bill of complaint is framed, this court cannot substitute an arbitrary finding of damages and profits and fix the amount or impose penalties. Stevens vs. Gladding, 17 How., 447, 453, 15 L. Ed., 155; Callaghan v. Myers, 128 U. S., 617, 663, 9 Sup. Ct., 177, 32 L. Ed., 457; Root v. Railway Co., 105 U. S., 189, 193, 26 L. Ed., 795.

"In 9 Cyc., 959, it is said, citing cases:

" 'The usual mode of ascertaining profits is by reference to a master to take evidence and report, although they may be ascertained from affidavits filed by the defendant.'

"In Patterson v. Ogilvie Pub. Co. (C. C.), 119 Fed., 451:

" 'The usual practice is to enter an interlocutory decree providing for an injunction and then send the matter to a master to take proof of damages and profits. Upon the return of the master's report, a final decree disposes of the question of damages.'

"I think the provisions of Section 25 of the act of March 4, 1909 (35 Stat., 1075, c. 320 [U. S. Comp. St. Supp., 1911, p. 1472]), 'An act to amend and consolidate the acts respecting copyright,' apply in this case. It is immaterial, so far as the remedies provided by that act are concerned, that this copyright was obtained prior to the passage of that act. That section provides:

" 'That if any person shall infringe the copyright in any work protected under the copyright laws of the United States, such person shall be liable,' etc.

"It was competent for Congress to give additional or more severe or more drastic remedies for the infringement of copyrights theretofore granted. But, of course, the remedies would only apply in the case of infringements committed after the act of 1909 went into effect." (From the opinion, 209 Fed., 894.)

Our interpretation of the Copyright Law as to the minimum damages corresponds with the interpretation given in this case by the Circuit Court of Appeals. The court said (record p. 54):

"We see no escape from the application of the **$250 minimum** in a case like this. It is difficult to think of any reason why a newspaper reproduction of a copyrighted pen and ink drawing of a hat should not be classified with a newspaper reproduction of a copyrighted photograph of similar articles; but it is not, and these sketches here involved are not photographs,—though they might as well have been—and unless the word 'photograph' is restricted to its established meaning, no line can be drawn; hence the $50.00 photograph minimum cannot apply.

It seems to us the plain meaning of the language that Congress intended that the plaintiff should not recover less than $250 damages in any copyright infringement suit not based upon a newspaper reproduction of a photograph,—at least in any case where the actual damages fail to appear so clearly and so fully as to forbid resort to the 'in lieu' class. The necessary effect of the provision is to prohibit the award of merely nominal damages."

In Hendricks v. Ttomas Pub. 242 Fed. 37, the court held that

"Where obvious and substantial pecuniary injury has been caused, the court is authorized to estimate the damages **within the statutory limits**, without being bound by legal proof, as 'actual' means real, as opposed to nominal, or existent, without precluding the thought of change, while 'in lieu' means in place of the thing modified."

We have discussed at some length the question of minimum damages because notwithstanding the solicitors for defendants in error ask that the judgment of the Circuit Court of Appeals be sustained they devoted several pages of their brief to the discussion of their interpretation of section 25, the burden of which is that the minimum named in the act should not apply in this case.

Solicitors for defendant in error also discussed the subject of notice. In Hein v. Harris 183 Fed. 107 it is held that intent to infringe need not be shown. In Gross v. Van Dyke Gravure Co. 230 Fed. 412 it was held in an infringement case that an infringer who did not know that he was infringing was liable for damages resulting.

But The Dispatch Printing Company was not an ignorant or innocent infringer. In the opinion of the District Court in this case (page 12) is this language:

> "Each of the defendants exercised reasonable care to avoid intrenching on the rights of copyright holders, excepting that it would seem in **one,** and **possibly another publication.** The Dispatch Printing Company **should have taken notice that a pictorial illustration noted as copyrighted appeared in the Morehouse-Martens Company advertisement and should not therefore have published it in another person's advertisement.**"

SEVEN SEPARATE INFRINGEMENTS.

We contend that there were seven different infringements by the defendant in error.

We repeat our previous analysis of the evidence and admission upon this point.

It has been either admitted or found by two courts ~~that~~ That

(1) **Each of the six sketches** in question were **copyrighted,**

(2) That **each coyright** was a **separate** and **distinct** act by the L. A. Westermann Company,

(3) That **six separate and distinct copyright pictures** were published in the Columbus Dispatch on **six separate dates,**

(4) That **six of these publications** were each in a **separate issue** of said newspaper on a **day different** from the publication of any of the other copyrighted pictures, and

(5) That **one** of these copyrighted pictures or sketches **was published on two distinct dates**, namely, October 15th, and November 10th, and for two different Dispatch **advertisers**, and

(6) That the Columbus Dispatch in so printing and publishing each of these copyrighted pictures infringed upon the rights of the plaintiff.

The Circuit Court of Appeals took the view that "the conduct of the defendant in this case constituted a connected and fairly unitary invasion of the proprietor's rights." They discuss the case of a book or musical composition and also the use of a catalogue or cuts or prints illustrating the products of a furniture manufacturer. No one of these cases can be said to be comparable to that of a newspaper infringing in the manner in which the infringement occurred in the case under consideration. Westermann's sketches were not all of a single subject but of various subjects. The cuts were not a part of a single scheme or plan but covered a wide field, and the various pictures or sketches were copyrighted separately and any one of them could be sold and published independently of the others. The fact that all were sold to Morehouse was a **mere incident.** They might have been divided up and sold to **several** customers, each customer using pictures or sketches different from the others. In the case of a book the copyrighting of the separate chapters of a book would be the copyrighting of the different parts of the complete

entity. A chapter might be wholly incomplete when standing alone, having no value. Each one of the Westermann pictures stood alone as a product separately copyrighted and having its own intrinsic value. In the case of a catalogue all of the separate pictures or drawings are combined and published as a single production.

The Circuit Court of Appeals in discussing the question of whether there are seven separate infringements states that "the damages would have been irrationally increased. We believe Congress meant no such result." We fail to see the reason for this conclusion. To say that **seven separate publications** on as many different days of **separately copyrighted pictures** of the plaintiff and running through parts of **three calendar months** constituted a unitary invasion of plaintiff's rights, and a single infringement would mean that the law practically gave immunity to large newspapers in the use of such sketches and cuts, since the payment of $250.00 would be **no compensation** for the great damage thereby wrought to the copyrighted proprietor. If the Dispatch could publish six sketches or pictures and treat those acts as a single infringement there would be nothing to prevent the printing of a different Westermann sketch every day during the entire season, if there should be that many sketches made during the season, and treating them all as a single infringement. Nor is there anything to prevent them from continuously printing or publishing such cuts through a number of seasons and having them all treated as a single infringement.

If the Act of Congress in question had been in language such as that the literal meaning of it would have implied a penalty of $250.00 for each copy of the newspaper in which the copyrighted sketch or picture had

appeared then it might well be said that the damages would have been irrationally increased. But by giving the law the interpretation for which we contend hundreds of thousands of copies of a single issue of a newspaper may contain an infringed copyrighted picture but the proprietor would have but a single right of recovery. When the publication covers different dates and different copyrighted pictures come to be considered a wholly different situation arises.

Suppose that these copyrighted sketches or pictures had been owned by seven separate proprietors. Could anybody then be heard to say that there was not seven separate rights of action? Or suppose that this Westermann service had been used by seven separate newspaper publishing companies but they had all used the service for which Morehouse had contracted and it had all been used the same year, then could there be any question made but that the plaintiff would have a separate cause of action against each of the parties so infringing, notwithstanding the fact that the number of pictures published were the same as in this case. Or suppose that after the pictures or sketches had been copyrighted the copyright proprietor had sold the copyright of such sketch or picture to six different persons, could there be any question but that each of the six persons would have a separate right of action for such infringement? Or suppose further that after the publication by the defendant of the copyrighted sketches or pictures L. A. Westermann Company had sold each of said copyrights of said sketches or pictures, together with all rights of action for infringement on the same, to seven different persons, could there be any question but that each of such persons would have a right of action against the defendant?

Suppose that the Westermann Company had brought an action against the Dispatch Publishing Company on September 19th and before the 1st day of November of the same year had succeeded in having the case heard and disposed of and recovered the minimum of such infringement; then suppose that on the 15th day of November the Dispatch published another one of the Westermann pictures and the plaintiff instituted a new action for such publication, would the Dispatch Company be heard to plead the former judgment in bar? The Circuit Court of Appeals recognizes the force of this argument when it says that the plaintiff might be able to bring several suits simultaneously in different jurisdictions and thus escape consolidation, but that court said that there will be time to meet such a problem when it arises. The Circuit Court of Appeals says that the plaintiff united and tied together his six separately copyrighted cuts by uniting them in a season's service which he sold exclusively to Columbus for Morehouse. But there is nothing to show that this service was not also sold to other parties in cities other than Columbus where the Columbus Dispatch circulates and is read.

The Circuit Court of Appeals grounds its conclusion as to the number of infringements upon the rule as to interpretation of words and construction of language announced in Church v. United States, 143 U. S. 457. But in that case the court found that while the matter under consideration was within the letter of the statute yet it was not within the statute, because not within its spirit, nor within the intention of its makers. There is nothing in the case at bar which warrants either of those conclusions. The language is plain.

In U. S. v. Goldenberg 168 U. S. 102 this court says:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, **but the cases are few and exceptional**, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, **no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.**"

The language of the Coypright Act is clear and unequivocal. It provides for damages for the infringement of the copyrighted article. The form is singular, not plural, in each instance. Damages to be allowed are not for the infringements, nor for the series of infringements. Instead of it being clear that the legislative intent was different from the language used it is clear that the language expresses a reasonable intent, and that the spirit of the Act is in harmony with the language, and is just and fair.

We quote from the language of the Circuit Court of Appeals Eighth Circuit:

"When the language of a statute is plain and unequivocal, it is not permissible to search for another meaning, which may have existed in the minds of individual legislators, and, finding that meaning, to substitute it for the meaning expressed."

"The Circuit Court, in affirming the decision of the board of general appraisers, referred to the case of Church of Holy Trinity v. United States, 143 U. S. 457, **which was apparently pressed upon its attention as an**

authority for permitting courts to discard the language of a statute, and interpret its purpose by the supposed intention of the laws makers, gathered from general considerations of justice or expediency. That adjudication, according to our experience, has been invariably cited where the effort has been to induce this court to legislate, and substitute its own notions of what the law should be for the plainly expressed will of the legislative body. **We do not understand, however, that it sanctions any new rules of statutory interpretation.**"

In re Downing, 56 Fed. 474.

The Tennessee Supreme Court uses this language:

"Except in a very clear case, that which is within the letter of a statute will not be excluded from its operation as not being within its spirit."

State v. Phoenix Ins. Co., 92 Tenn. 420.

Chief Justice Marshall, in Sturgis v. Crowninshield, 4 Wheat. 202-3, said: "The spirit prevails over the plain letter of the statute **only** in cases in which the absurdity and injustice of applying the provision to the case would be **so monstrous that all mankind would, without hesitation, unite in rejecting the application.**"

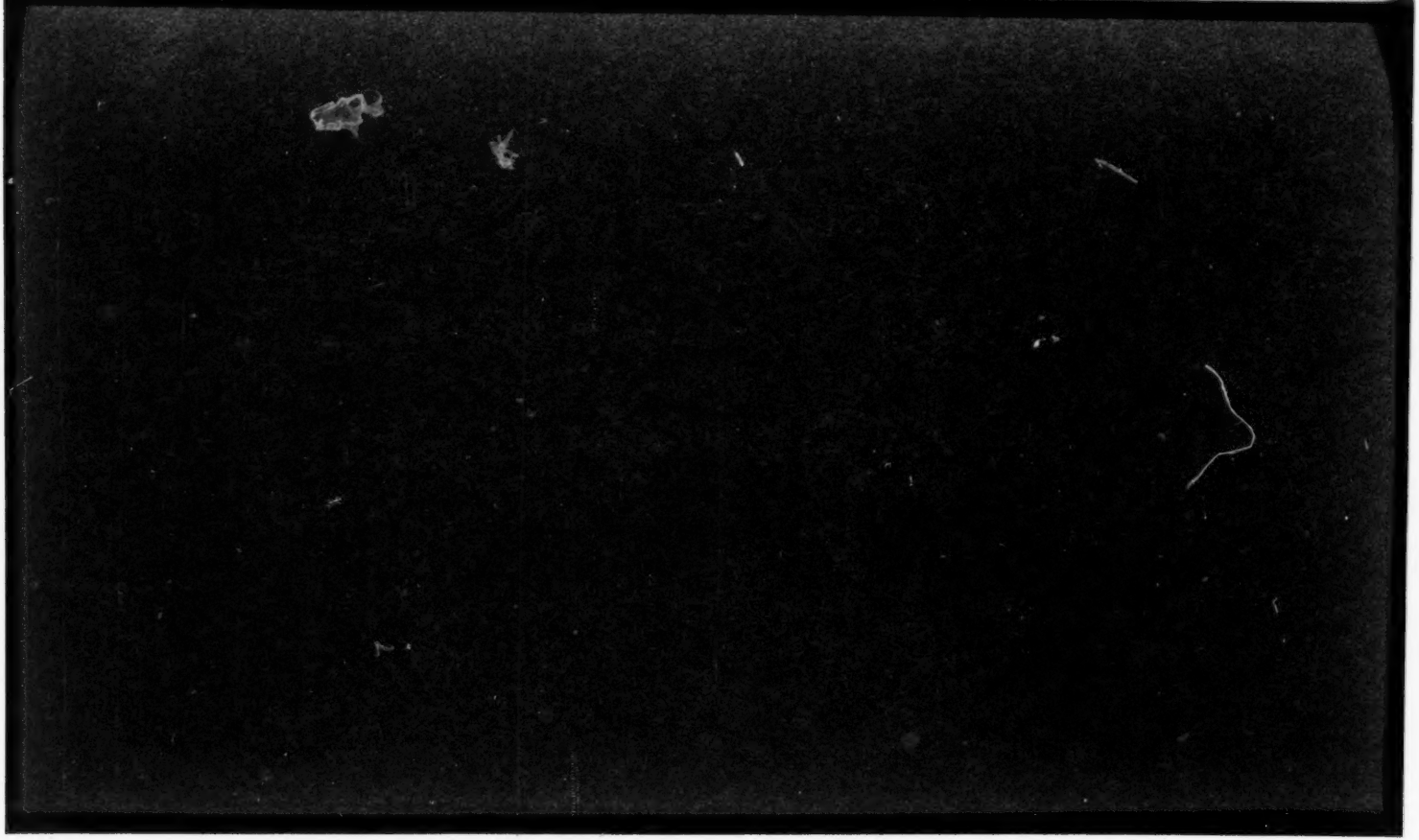
We ask for an interpretation which we believe will be consistent with the plain language of the Act as well as the evident intention of the lawmakers.

Respectfully submitted,

CURTIS C. WILLIAMS,

SIMEON NASH,

Solicitors for Plaintiff in Error.



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Supreme Court of the United States

OCTOBER TERM 1916.

No. 742

L. A. WESTERMANN COMPANY,
Plaintiff in Error,

vs.

THE DISPATCH PRINTING COMPANY,
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

I.

STATEMENT OF THE CASE.

This case is brought into this court by the plaintiff in error on a writ of certiorari from the United States Circuit Court of Appeals for the Sixth Circuit. (Transcript, pp. 59-60.)

It was begun originally by the plaintiff in error company against the defendant in error company in the District Court of the United States for the Southern District of Ohio to recover certain statutory penalties, or damages, for alleged infringement of certain copyright matter, under the copyright Act of March 4th, 1909. In addition to an injunction and related relief, the plaintiff in

error sought to recover thirty-five thousand dollars ($35,000) by virtue of that portion of Section 25 of the Copyright Act of March 4th, 1909, (Federal Statutes, Annotated, Supp. 1909, p. 87) which is as follows:

> "(b) To the copyright proprietor such damages as the copyright proprietor may have suffered * * * or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts hereinafter stated * * *, and such damages shall * * * not exceed the sum of five thousand dollars ($5000) nor be less than the sum of two hundred and fifty dollars ($250), and shall not be regarded as a penalty."

On the trial below it developed that the plaintiff in error was engaged in the business of designing woman's attire and in selling the right to others to use such designs in their advertising forms. The exclusive right, which is alleged as having been infringed, was given to The Morehouse-Martens Company, Columbus, Ohio, for that city and vicinity for a valuable consideration. Such company was not made a party defendant, though the defendant in error moved the court that that be done.

The District Court decreed the plaintiff below an injunction and nominal damages. It found and decreed that there were no actual damages to be accounted for. It adjudged to the complainant the amount of ten dollars ($10.00) for each of the seven infringements. In addition to this that court awarded an attorney's fee of twenty-five dollars ($25.00). (Transcript of Record, pp. 14, 15.) Complainant made a motion for a new trial, which was overruled. (Record, p. 15.) It prosecuted both error and appeal to the Court of Appeals for the Sixth Circuit. (Record, 16-17.)

On the hearing in the Circuit Court of Appeals the decree of the District Court was reversed and the cause remanded with instructions to enter a decree for plaintiff in error for two hundred fifty dollars ($250.00) damages and costs, and the attorney fee of $25.00 fixed by that court. (Record, p. 59.)

The defendant in error was content with the decrees in each of the courts and prosecuted no appeal or writ of error therefrom.

The specific assignment of error made by the plaintiff in error is that the Circuit Court of Appeals erred in not awarding the plaintiff in error a decree for at least two hundred fifty dollars ($250.00) for each infringement, it being its contention that the Court of Appeals could exercise no discretion in allowing an amount less than the minimum stated in the Copyright Act, above quoted.

II.

DISCUSSION OF THE OPINIONS OF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS.

Copies of the opinions of the District Court are found on pp. 10, 14; pp. 25, 26, Transcript of Record. The summary thereof shows that no attempt was made by the complainant below to prove any damages. There was no testimony of profits lost by the plaintiff in error or profits made by defendant in error. Therefore, neither actual damages or profits entered into the case.

It was found by the District Court that there was no evidence on which other than nominal damages could be based. (Record, p. 12.) Guilty knowledge or intent are

also absent. (Record, p. 12.) In the view of the District Court the ends of justice did not require a judgment in the cause for more than a nominal sum. There having been seven different dates of publication, that court allowed ten dollars ($10.00) for each publication, or an aggregate of seventy dollars ($70.00) plus the costs and an attorney fee of twenty-five dollars ($25.00). (Record, p. 3.)

The Circuit Court of Appeals (Record, pp. 51, 53) agreed with the District Court as to the evidence on damages and profits. It treated the question as one invoking "The proper measure of damages under Sec. 25 (of the Copyright Act) as applied to the facts of the case." (Record, p. 53.) But the Circuit Court of Appeals differed from the District Court in having found that there were seven different infringements and that court found that all the publications involved related to a single subject, viz., fashions for women's wear for a single season, and that the plaintiff below "had united and tied together all of his copyrighted cuts as completely as if it had published them only in one catalogue or one book." (Record, p. 58.) It therefore held that this was in substantial effect one right, and the technical violation of that right constituted but one infringement. The decree of the District Court was reversed and the cause remanded to enter a decree for the plaintiff below for two hundred fifty dollars ($250.00) damages, costs and the attorney fee fixed by that court.

The plaintiff in error here insists upon the reversal of the decree of the Circuit Court of Appeals and for such construction of the Copyright Act by which it should be permitted to recover an arbitrary amount of at least two hundred fifty dollars ($250.00) for each infringement, counting each publication as a separate infringement.

We need not be partisans of either opinion. Both are just from their respective views of the copyright law. They proceed upon the same line of reasoning—that as no profits or damages had been shown, it would not "appear to be just" to grant to the plaintiff a money judgment for more than one minimum recovery.

As the District Court said (Transcript, p. 12), "The law is not to be used oppressively;" and the Circuit Court of Appeals agrees therein when it is said that (Transcript, p. 57), "the damages would be irrationally increased."

This reasoning sounds in the conception of justice, made so prominent in the Act, that the amount which may be decreed "in lieu of actual damages and profits, as to the court shall appear to be just." So, it remains a question of construction for this court. Either theory of the lower courts may be rejected and the amount not increased, but yet the theory of the plaintiff be not accepted, because it is the one theory not consistent with justice as measured by the evidence in the case.

III.

DEFENDANT'S INTERPRETATION OF SECTION 25.

We contend that Section 25 was enacted by Congress for the purpose of providing:

1. Relief by way of injunction, and

2. Relief by way of damages which is declared to be not a penalty.

That in providing for a recovery of a sum within the prescribed limits, **in lieu** of actual damages, Congress did not mean to enact a penalty but recognizing the character of the **actual damage** done, provides, that when the actual damages are proven which cannot be measured in dollars

and cents, then the court may, in the exercise of its sound discretion, award a sum within the maximum and minimum limits. At the possible expense of repetition, we insist, that Congress, in enacting this law obviated the strict necessity of proving the exact amount of the damage without negativing the necessity for proof of some real damage done. To place any other construction on this section would be to make that which is recovered by virtue thereof a penalty, pure and simple.

What was the state of the law applicable to such facts before the enactment of the Copyright Act in question?

In New York City vs. Ransom, 23 Howard, 487, it was held that in an action for damages for the infringement of a patent right, the plaintiff must furnish some data by which the jury may estimate the actual damage. If he rests his case after merely proving an infringement of his patent, he may be entitled to nominal damages **but no more.**

The foregoing case is very much in point.

In Dobson vs. Hartford Carpet Company, 114 U. S., 439, and Coupe vs. Royer, 155 U. S., 565, it was held that, where there is no proof of substantial loss or injury to be compensated, but the law nevertheless recognizes a technical invasion of the plaintiff's rights, or a breach of the defendant's duty, **a trifling sum** may be awarded by way of nominal damages.

In Birdsall vs. Coolidge, 93 U. S., 64, it is held; actual or compensatory damages mean the same thing; that is, that the damages shall be the result of the injury **alleged** and **proved,** and that the amount awarded shall be precisely commensurate with the injury suffered, neither more or less, whether the injury be to the person or estate of the complaining party.

In the case of Rude et al., Admr., vs. Wescott et al., Exr., 130 U. S., 152, this court had before it the question of the measure of damages resulting from infringement of certain patents, and said:

"Actual damages **must be shown**, and by clear and definite proof to warrant a recovery for the infringement of the patent."

On page 167, supra, it was said:

> "Opinions not founded on knowledge were of no value. Conclusions from such opinion, are at best mere guesses. By the decision rendered, a settled rule of law was violated, that actual not speculative damages must be shown, and by clear and definite proof to warrant a recovery for the infringement of a patent. As was said long ago by this court, 'Actual damages must be calculated not imagined; an arithmetical calculation cannot be made without certain data on which to make it.'" (Citing cases.)

The foregoing authorities support the view that an award of **nominal** damages may be made when a right has been invaded or infringed and no damages **shown,** but actual damages must be supported by competent testimony.

The foregoing rule of the law, which is applicable as a rule of construction to Section 25, is sustained in Woodman vs. Lydyard-Peterson Co., 192 Fed., 67 (204 Fed., 921); the District Court said, at page 70 of the first cited opinion:

> "It is admitted that the defendant did not sell the maps. It made nothing at all out of them, and the complainant very properly waived all rights to an accounting in the matter of profits. The law allows the complainant in a case of this kind to recover damages.
>
> Prior to the Act of 1909, he had to prove his damages * * *

> The anomalous provision in this section is this: That the court may in lieu of actual damages and profits in its discretion allow such damages as shall appear to be just; yet it apparently requires such damages in this case to be $250. But it cannot be possible that, where the court is of the opinion that there are no damages at all, it still is bound to allow $250, and that, where the court is of the opinion that it would be a matter of injustice to allow even $1.00, it would be compelled by law to allow $250. Some other construction must be given to that provision. **I think it means that where the court is satisfied that there are substantial damages, but the evidence is incomplete or is insufficient, so that the court cannot determine just what the damages are, then it may allow them on that basis. But wherever the court is of the opinion that the damages cannot be more than $50 or $100 it should not allow $250.**"

The District Court in the instant case expressed approval of the foregoing opinion in the following language (Transcript, p. 3):

> "Judge Willard's decision in the Woodman case is quite satisfactory and I am content to follow closely in his footsteps."

The Circuit Court of Appeals' comment thereon is (Transcript, p. 55):

> "Perhaps this natural assumption tends to persuade that Congress did not intend to abolish mere nominal damages."

Our view is further sustained in the case of Cohn Company vs. Etchison Hat Company, 225 Federal, 135, 136. The United States District Court for the Eastern District of Virginia said, in construing Section 25 of the act aforesaid:

> "Whether this allowance of damages is discretionary or not is not entirely clear. The court is inclined to think that the interpretation of Section 25

of the Act leaves it within the discretion of the court to allow or refuse damages entirely."

In the case of S. E. Hendricks Co. vs. Thomas Publishing Co., 242 Fed., 37, the Circuit Court of Appeals of the second circuit, in construing the same section made use of the following language:

> "That the language of the section (25) of the Copyright Act relating to the assessment of damages and profits is somewhat obscure we have pointed out before. Mail & Express Company vs. Life Publishing Company, 192 Federal, at page 901 * * *
>
> As is well known, the language of this section is a growth of years, resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary source, even when the rules of law rendered it difficult if not impossible as it often is, to prove damages or discover profits * * *.
>
> There may be circumstances under which discretion revolts from any award, by reason of the trivial nature of the thing copyrighted, or the slight success of attempted infringement: * * *. We entertain no doubt that it was the intention of Congress,
>
> 1. To preserve the right of the plaintiff to pursue damages and profits by the historic methods of equity if he chooses so to do; and
>
> 2. To give the new right of application to the court for such damages as shall, 'appear to be just' in lieu of actual damages."

It thus appears that by whatever court the section in question has been construed, it has been uniformly held that no construction would be adopted sanctioning the recovery of even the minimum amount provided in the Act, unless damages had been shown by the testimony to have been sustained and in such amount that would lead the court to say that an award of at least the minimum, $250, would be just.

IV.

COUNSEL FEES NOT REVIEWABLE.

It is provided by Section 40 of the Act in question as follows:

> "That in all actions, suits, or proceedings under this Act, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney fee as part of the costs."

Under this authority the District Court adjudged an attorney's fee to the plaintiff in error of $25 (Transcript, pages 14 and 15). The attorney fee remained the same in the judgment of the Circuit Court of Appeals (Transcript, page 59). As to the amount of the attorney fees thus allowed by both the lower courts, there can be no review in this court unless there has been an abuse of discretion, which is not claimed by the plaintiff.

> "Counsel's fee is a matter peculiarly within the discretion of the court awarding the same, because that court can and always does proceed upon its own rule of the value and extent of the professional services rendered."

Hence, the allowance is not reviewable unless there is an abuse of discretion shown.

S. E. Hendricks Co. vs. Thomas Publishing Co., 242 Fed., 42;
Central Trust Company vs. U. S., etc., Co., 233 Fed., 420;
147 C. C. A., 356.

V.

NO EVIDENCE OF NOTICE OF COPYRIGHT.

It was commented upon by both the lower courts that no guilty knowledge was shown against the defendant in error that the pictorial illustrations were copyrighted.

The law in question contains the following provision:

> "Section 20: That where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, **after actual notice of the copyright,** begins an undertaking to infringe it, **but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice;** and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay, innocently incurred, if the court, in its discretion, shall so direct."

Section 18 of the Act provides what shall constitute notice of copyright, which shall consist of the word "copyright," or the abbreviation "copr." accompanied by the name of the proprietor. In the case of copies of certain works the notice may consist of the letter "C" enclosed within a circle accompanied by the initials, monogram, mark or symbol of the copyright proprietor. It is thus apparent that each particular illustration must contain upon some portion of it a mark indicating that the same has been copyrighted, and if it does not clearly appear thereon, and a party has been misled by the omission thereof, and has published the same, he becomes an innocent infringer in view thereof.

The record contains the following evidence thereon:

(Transcript, page 35), George E. Fowler was the business manager of The Dispatch Printing Company; that at the time the cuts were used as advertisements in the defendant's newspaper, he did not know that the cuts were copyrighted, and that so far as the witness knew no one else connected with the defendant company knew that they were copyrighted; that the instructions of the defendant company to the advertising department, and other employes of the defendant company, are that they should not use any cuts that are marked copyrighted or any cuts that they may think are copyrighted; that the witness had never knowingly used any cut that was copyrighted, nor so far as the witness knew had the defendant company done so * * * that the instructions of the witness to advertising solicitors were that in case of any doubt for any reason, it should be brought to the witness for a decision; that none of the seven advertisements attached as exhibits to the bill of complaint were ever brought to the witness or anyone else prior to publication. (Transcript, page 36): That the clippings, from which the cuts used in printed advertisements, attached as exhibits to the bill of complaint, were never submitted to the witness.

The witness, Harvey R. Young, on the same point, testified as follows:

(Transcript, page 37): That all the large stores which had advertising managers usually subscribed for newspapers from all over the United States, which assisted the advertising managers of stores in preparing copies for advertisements, not only in wording but in illustrations; that the advertising writers of these stores look over the forms and pictures in these papers and if they find a good advertisement or a good illustration, he some-

times uses it or a portion of it; that if the cut or illustration showed "copyright," and the defendant's advertising solicitors knew this, the solicitor would refuse to use it and tell the party that it was copyrighted and he could not use it; that these were the instructions to the solicitors; that the witness had examined all the exhibits attached to the bill of complaint in this case and that one of these illustrations which was used by the Walter J. Dwyer Company was furnished the witness personally by a Miss Murphy who had charge of the advertising for that company; that the defendant company used this illustration in its paper but that it had no copyright mark on it; that it was not marked copyrighted when Miss Murphy gave it to the witness, but that the witness could not say anything about its condition before she gave it to him; that the witness did not know that the pictures were copyrighted until this case was filed in this court.

The witness, J. M. Mead, on the same subject, testified as follows (Transcript, page 38): That he had been advertising solicitor for the defendant two years and four months; that he used the same method for soliciting advertisement from customers as the other solicitors; that the smaller advertisers sometimes needed a little help in writing their copy or in securing illustrations and that he sometimes submitted to advertisers articles and clipings from foreign papers; that witness had not to his knowledge used any illustrations which were copyrighted; and that he had always been instructed to be very careful about using copyrighted matter and that he had always looked at each clipping to see that there was no copyright mark thereon.

The witness, Thomas C. Roberts, on the same point, testified as follows (Transcript, page 39): That he had

never used any Westermann illustrations, knowing them to be copyrighted; that with the permission of The Columbus Citizen, he had used some copyrighted illustrations but that this was the only instance in which he had used any.

The foregoing evidence justified the lower courts in commenting upon the lack of actual notice or guilty knowledge on the part of the defendant that the illustrations had been copyrighted.

Section 20 of the Act has been construed in the following cases, and the view is sustained that a lack of notice prevents recovery of damages against an innocent infringer:

Cohn Company vs. Etchison Hat Company, 225 Fed., 136;
Straus vs. Penn Printing & Publishing Co., 220 Fed., 977;
Huebsch vs. Arthur H. Crist Co., 209 Fed., 889.

We contend, that by the language of the Act in question the rule announced by this court in cases that are similar in principle should here be adopted, that is, that recovery can only be had in cases coming strictly within the terms of the Act. Where the testimony shows that the publications were not "knowingly made" the damages or penalty should not be applied.

United States of America vs. Northern Pacific Ry. Co., 242 U. S., 190.

Indeed it would seem that should the construction be adopted as contended for by plaintiff in error, the Act would violate the "due process" provision of the constitution, in that an excessive penalty would be a denial of due process of law as it would compel one to pay dam-

ages to another where no actual damage has been sustained, and not as a penalty.

State of Washington vs. Crawford, 46 L. R. A. (N. S.) 1039;
Ex Parte Young, 209 U. S., 123;
Wadley Southern Ry. Co. vs. State of Georgia, 235 U. S., 651.

VI.

EFFECT OF PLAINTIFF IN ERROR'S CONTRACT WITH EXCLUSIVE LICENSEE.

The testimony of Edward R. Parsons **inter alia** shows that he was the manager of the advertising department of The Morehouse-Martens Company, Columbus merchants, on behalf of that company he made a contract with the plaintiff in error, covering the time included in this action by which the merchant company was given the exclusive right to use the illustrations in question in Columbus and vicinity. The Morehouse-Martens Company thereby had an exclusive license to use the illustrations. Nothing contained in the evidence shows any complaint on the part of The Morehouse-Martens Company, the licensee, for any damages sustained by it. It is not seeking to recover against the defendant in error. Upon the trial in the District Court it was moved by the defendant in error to join the licensee as a plaintiff or to dismiss. The Court of Appeals in commenting upon this (Transcript, 53) said it saw no reason for considering the question on its own motion, in the absence of any complaint from the defendant in error. It expressed the view that it would be open to that court to consider such issue **because it was involved in any judgment for the plaintiff.**

We contend that this is involved in the plaintiff's right to recover and especially in its right to recover more than nominal damages. When it appears in the testimony that the contract made with The Morehouse-Martens Company was fully performed by that company and the consideration paid to plaintiff thereunder without any diminution thereof or damages claimed by the licensee, it, the plaintiff company, was not damaged other than could be said to be a technical violation of its copyright.

As we have argued heretofore, a technical violation, independent of evidence sustaining actual damages, merely carries nominal damages, costs and injunctive relief. Under these circumstances if any damages were sustained, which is not shown, they could not in equity be claimed by the licensor, the plaintiff company.

In the case of Bredin vs. Solmson, 145 Fed., 944, Morris, District Judge, said:

> "A decree in favor of the complainants for profits would be to place them in a better condition by reason of the infringement than they would have been had there not been the infringement. It has been held that suits in equity for the recovery of profits must be brought by the owner of the patent right and the exclusive licensees suing together as joint complainants."

In the case of National Weatherstrip Co. vs. Bredin, 186 Fed., 480 (C. C. A.), it is said:

> "In a suit for infringement by the joint owners of a patent, profits and damages which inure to the benefit of one of the complainants only as a licensee, are not recoverable where no foundation for such recovery is laid by the pleadings, but complainants sue as joint owners only."

In Brookfield vs. Novelty Glass Co., 170 Federal, 960 (C. C. A.), the facts disclosed that an individual owner

of a patent sued for its infringement for himself alone. The question arose as to whether he could recover any part of the damages accruing to the licensee. The court said (p. 962):

> "If anything by way of damages is to be recovered on its account (the Glass Company) there should have been something in the bill to indicate, if that were indeed the case, that it was prosecuted in part on its behalf; and that, without this, the owner of the patent, proceeding to all intents and purposes for himself alone, is to be confined to the damages which he himself has received, of which those of his licensee is not a part."

The record nowhere discloses any damages sustained by the plaintiff company.

There is such analogy between the actions under the patent law and actions under the copyright law that like rules of practice should be applied in both classes of cases; **Scribner vs. Straus**, 130 Fed., 389.

The court will not be misled by the exhibits contained in the record, which are in most of the instances plainly marked "Copyrighted," but are not exact reproductions of the illustrations innocently used by the defendant company. The exhibits are reproductions, including the copyright marks, of the original on file with the Register of Copyrights, but are not copies of those taken from the defendant's publications. This is clearly shown by the testimony of the four witnesses heretofore quoted.

VII.

BRADY v. DALY, 175 U. S., 146, DISCUSSED.

Not having the benefit of the brief of the plaintiff in error at the time of preparing this brief, we can only judge the present contention of the plaintiff in error by that made in the courts below. There the contention was made that the instant case was ruled by the opinion of this court in Brady vs. Daly, 175 U. S., 146. Our contention is that the opinion in that case is not decisive here. It was brought under favor of Sec. 4966, R. S. U. S., and decided in 1899. The Copyright Act in question was adopted in 1909.

The Daly case was for the violation of a dramatic copyright to recover damages therefor, in which upon the first hearing in the District Court the court awarded judgment for the defendant, refusing the plaintiff any recovery for damages.

Subsequently upon application to that court the cause was opened and testimony introduced. The testimony bore upon the number of times the drama had been produced by the defendant with a certain scene therein which constituted the infringement, and upon the evidence thus introduced a money judgment was rendered for plaintiff with costs. The judgment included the minimum amount of $50 for each performance in which the infringed matter was used, as provided by Sec. 4966, R. S.

To show that the Daly case cannot here be considered as a precedent to be followed, the difference in the facts and the law should be noted. In the instant case the evi-

dence on the question of damage, (Transcript, p. 31) is as follows, from the testimony of L. A. Westermann:

> "Q. Is it possible for you to measure in dollars and cents, or in money, the damage you have sustained by reason of these infringements of copyrights? A. No.
>
> * * * * * * * * *
>
> Q. Why? A. Because the costs of publication cannot—because it cannot be proportioned in respect to single illustrations."

This is an admission of no evidence of actual damages. In the Daly case the finding was **based upon the evidence.**

Section 4966, R. S., permitted an arbitrary statutory award of $50 for each performance. The present copyright act provides that the infringer be paid such damages **as he may have suffered.** Damages must be proven; they are actual damages, or in lieu of actual damages, such damages as to the court shall appear to be just.

Since the present act does not automatically create damages any assumption of the existence of the same, without competent and sufficient proof is in direct contravention of it and **ipso facto,** renders that which is awarded, a penalty, contrary to the express language of the act. The radical changes in the theretofore existing law made by the present act are

(a) Lack of notice makes a defense.

(b) Recovery of damages for infringement is made possible in a civil action.

(c) Drastic provision for the punishment of wilful infringement is provided inasmuch as the wrong-doer may be fined, subjected to penalty or imprisonment and the copyrighted matter seized and destroyed.

(d) The rule of evidence as to damages is made **statutory.**

There are other distinct changes made in the act as follows: By the present Act there is a discretion in the court allowed independent of the maximum and minimum. There is a definition of an innocent infringer; there is statutory recognition that such innocent infringer may be entitled to all his reasonable outlay and in many other respects changes are noted that were not contained in Section 4966, R. S.

Further analysis of the present Act (Section 25) shows that the court should have a broad discretion, irrespective of minimum and maximum amounts, in giving judgment. In the instant case, may the plaintiff be awarded $5000 while in the instance of a copyrighted dramatic or musical work by motion pictures **the entire sum of such damages recovered by the copyright proprietor, shall not exceed $5000?** The latter instance presents the possibility, according to plaintiff's contention, of a valuable dramatic or musical work being infringed by a maker of motion pictures and **but one recovery permitted as an entire sum,** while in the instant case a series of recoveries are claimed for each of the separate illustrations infringed.

Evidently the possibility of great injustice being done under a statute irrevocably fixing arbitrary amounts led Congress to vest in the court hearing the case a broad discretion as to the justice of allowing any damages.

The judgment of the Circuit Court of Appeals should be sustained.

Respectfully submitted,

SMITH W. BENNETT,

LUTHER DAY,

Solicitors for Defendant in Error.

L. A. WESTERMANN COMPANY *v.* DISPATCH PRINTING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 50. Submitted November 15, 1918.—Decided March 3, 1919.

The liability imposed by § 25 of the Copyright Act attaches in respect of each copyright infringed, though by the same party. P. 105.

Several and distinct liabilities arise from several, distinct infringements of the same copyright by the same party. *Id.*

Where it is not shown that the infringer made profits, and it appears by the evidence that the damages, though actual, cannot be estimated in money, damages "in lieu of actual damages and profits" are assessable under § 25 of the Copyright Act. P. 106.

In such cases, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement, etc., is made the measure of the damages to be paid, but with the express qualification that the assessment must be within the maximum and minimum limits prescribed by the section. *Id.*

The owner of separate copyrights for pictorial illustrations of styles for women's apparel made a business of granting exclusive licenses, restricted as to time and locality, for the use of the illustrations by dealers in such apparel in advertising their goods, receiving com-

pensation therefor. In a city covered by such a license, the owner of a newspaper issued daily in thousands of copies widely circulated, published, without the consent of the copyright owner or its licensee, in advertisements of business rivals of the latter, six of the copyrighted illustrations, separately, each in a distinct issue and in all the copies of the paper, five being so published but once, the other twice, in independent advertisements for different advertisers, separated by an interval of some days. *Held*, that there were seven distinct infringements, and that the damages "in lieu of actual damages and profits" under § 25 of the Copyright Act could not be less than $250 for each case.

233 Fed. Rep. 609, reversed.

THE case is stated in the opinion.

Mr. Curtis C. Williams for petitioner. *Mr. Simeon Nash* was also on the brief.

Mr. Smith W. Bennett and *Mr. Luther Day* for respondent:

Section 25 of the Copyright Act was intended to provide (1) relief by injunction, and (2) relief by way of damages, declared not to be penal. In providing for a recovery of a sum within the prescribed limits, in lieu of actual damages, Congress did not mean to enact a penalty but, recognizing the character of the actual damage done, provides that when actual damages are proven which cannot be measured in dollars and cents, then the court may, in the exercise of its sound discretion, award a sum within the maximum and minimum limits. That is, this law obviated the strict necessity of proving the exact amount of the damage without negativing the necessity for proof of some real damage done. To place any other construction on the section would be to make that which is recovered by it a penalty, pure and simple.

Before the adoption of this Copyright Act, the rule was that an award of nominal damages might be made when a right had been invaded or infringed and no damages

shown, but actual damages must be supported by competent testimony. *New York City* v. *Ransom*, 23 How. 487; *Dobson* v. *Hartford Carpet Co.*, 114 U. S. 439; *Coupe* v. *Royer*, 155 U. S. 565; *Birdsall* v. *Coolidge*, 93 U. S. 64; *Rude* v. *Westcott*, 130 U. S. 152. This rule is applicable as a rule of construction to the section now in question. *Woodman* v. *Lydiard-Peterson Co.*, 192 Fed. Rep. 67, 70; 204 Fed. Rep. 921; *Alfred Decker Cohn Co.* v. *Etchison Hat Co.*, 225 Fed. Rep. 135, 136; *Hendricks Co.* v. *Thomas Publishing Co.*, 242 Fed. Rep. 37.

Mr. Justice Van Devanter delivered the opinion of the court.

This was a bill for an injunction against future infringement of certain copyrights and to recover damages for past infringement. The injunction was granted and in this both parties acquiesced. In addition, the District Court found that there were seven cases of infringement and awarded $10 as nominal damages for each case—$70 in all. The plaintiff appealed, insisting that for each case it was entitled under the copyright law to an award of not less than $250. The Circuit Court of Appeals sustained that contention, but held that what the District Court regarded as seven cases was only one and directed that the decree be modified by awarding $250, instead of $70, as damages. 233 Fed. Rep. 609. A writ of certiorari granted on the plaintiff's petition brings the matter here.

Whether there were seven cases of infringement or only one, and whether the damages should have been assessed at not less than $250 for each case, are the questions to be considered. The facts bearing on the solution of these questions are as follows:

The plaintiff designs and produces pictorial illustrations of styles in women's apparel and supplies the same to dealers in such apparel for use in advertising their

goods. All the illustrations are separately copyrighted and all authorized copies carry the required copyright notice. The plaintiff grants exclusive licenses to use the illustrations for limited periods, each license being restricted to a particular locality. The dealer obtaining the license pays a fixed charge for it. Ordinarily the fact that the license is exclusive makes it attractive, serves as an incentive for paying the charge and is a helpful feature of the plaintiff's business. But when infringers use the illustrations the strength of that feature diminishes and the plaintiff's business suffers accordingly.

At the time of the infringing acts in question the Morehouse-Martens Company, a dealer at Columbus, Ohio, had an exclusive license from the plaintiff covering the use of the illustrations in that locality.

The defendant publishes at Columbus a daily newspaper, each issue comprising as many as 30,000 copies widely circulated. Without the consent or authority of the plaintiff or its licensee the defendant reproduced and published in its newspaper six of the plaintiff's copyrighted illustrations. They were published separately, each in a distinct issue and in all the copies. Five were published once and the other one twice, the illustrations being used in each instance as part of an advertisement by some competitor in trade of the plaintiff's licensee. The two advertisements having the same illustration were by different advertisers and were separated by an interval of twenty-six days.

The record, while showing that the plaintiff was damaged by the infringing publications, does not show the amount of the damages, a matter which is explained by undisputed testimony to the effect that the damages could not be estimated or stated "in dollars and cents, or in money." On this point the Circuit Court of Appeals aptly said: "The plaintiff's damages rested in the injury to his Morehouse contract, and in the discouragement of

and the tendency to destroy his system of business. To make any accurate proof of actual damages was obviously impossible." Whether the defendant made any profit from the publications does not appear. In its bill the plaintiff asked for what are termed statutory damages in lieu of actual damages and profits.

The copyright statute, Act March 4, 1909, c. 320, 35 Stat. 1075, gives to one who copyrights a pictorial illustration the exclusive right to print, reprint, publish, copy and vend the same (§§ 1 and 5), and provides (§ 25[1]) that one who infringes "the copyright in any work" so protected shall be liable, among other things,—

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . , or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty:

"First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Second. In the case of any work enumerated in section five of this Act,[2] except a painting, statue, or sculp-

[1] For a subsequent amendment of this section see c. 356, 37 Stat. 488.

[2] "Prints and pictorial illustrations" are among the copyrightable works enumerated in § 5.

ture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

"Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance."

The statute says that the liability thus defined is imposed for infringing "the copyright in any" copyrighted "work." The words are in the singular, not the plural. Each copyright is treated as a distinct entity, and the infringement of it as a distinct wrong to be redressed through the enforcement of this liability. Infringement of several copyrights is not put on the same level with infringement of one. On the contrary, the plain import of the statute is that this liability attaches in respect of each copyright that is infringed. Here six were infringed, each covering a different illustration. Thus there were at least six cases of infringement in the sense of the statute. Was there also another? The illustration covered by one of the copyrights was published on two separate occasions, each time in a different advertisement. There was no connection between the two advertisements other than the inclusion of the same illustration in both. Each was by a different advertiser and was published at his instance and for his benefit. The advertisers were not joint, but independent, infringers, neither having any connection with what was done by the other. By publishing their advertisements, the defendant participated in their independent infringements. In these circumstances, we think the second publication of the illustration must be regarded as another and distinct case of infringement. Whether it would be otherwise if that publication had

been merely a continuation or repetition of the first, and what bearing the "third" and "fourth" subdivisions of § 25, before quoted, would have on the solution of that question, are matters which we have no occasion to consider now. They are mentioned only to show that no ruling thereon is intended.

We conclude, as did the District Court, that there were seven cases of infringement in the sense of the statute.

On the question of the amount of damages to be awarded for each case we are in accord with the Circuit Court of Appeals. Both parties recognize that under the proofs the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be "in lieu of actual damages" shows that something other than actual damages is intended—that another measure is to be applied in making the assessment. There is no uncertainty as to what that measure is or as to its limitations. The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they be more than $5,000 nor less than $250, except that for a newspaper reproduction of a copyrighted photograph they shall not be more than $200 nor less than $50. In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling, but it has

no discretion when proceeding under this provision to go outside of them.

Apart from the natural import of its words, the history of the provision makes strongly for this view. An early statute required the infringer of a copyright in a dramatic composition to pay such damages "as to the court shall appear to be just," but "not less than" a prescribed amount. Act August 18, 1856, c. 169, 11 Stat. 138; Act July 8, 1870, c. 230, § 101, 16 Stat. 214. This statute became § 4966 of the Revised Statutes. A later statute provided that the recovery for infringing a copyright in an engraving should not be less than $250 nor more than $10,000, and for infringing a copyright in a photograph of an object other than a work of art should not be less than $100 nor more than $5,000. Act March 2, 1895, c. 194, 28 Stat. 965. In 1909, when the copyright statutes were revised, these provisions, and others without present bearing, were brought together in the "in lieu" provision now under consideration. True, they were broadened so as to include other copyrights and the limitations were changed in amount, but the principle on which they proceeded—that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations—was retained. The new provision, like one of the old, says the damages shall be such "as to the court shall appear to be just." Like both the old, it prescribes a minimum limitation and, like one, a maximum limitation.

In *Brady* v. *Daly*, 175 U. S. 148, which was an action to recover for the infringement of a copyright in a dramatic composition, the first of the earlier provisions—that in § 4966, Rev. Stats.—was much considered. The trial court was of opinion that, while the damages were to be such as appeared to it to be just, it could not go below the prescribed minimum; and it made the assessment accordingly. In this court it was contended that in this view

the provision was penal and the action was one to recover a penalty. But the contention was overruled and the judgment affirmed, the court saying, pp. 154, 157:

"It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong and to grant to the proprietor the right to recover the damages which he has sustained therefrom.

"The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. In the face of the difficulty of determining the amount of such damages in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. The statute itself does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. The person wrongfully performing or representing a dramatic composition is, in the words of the statute, 'liable for damages therefor.' This means all the damages that are the direct result of his wrongful act. The further provision in the statute, that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one."

* * * * * * * *

"Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum

amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained."

It was after the minimum limitation was thus recognized as of controlling force in the assessment of the damages that the terms of the provision then under consideration were substantially repeated in the "in lieu" provision of the revised act. This hardly would have been done had it not been intended that the limitation should be as controlling there as in the earlier statute. That it was intended to be thus controlling is shown by the reports of the committees on whose recommendation the act was passed. House Report No. 2222, and Senate Report No. 1108, 60th Cong., 2d sess.

In our opinion the District Court erred in awarding less than $250 damages in each of the seven cases and the Circuit Court of Appeals erred in holding there was only one case instead of seven.

Decree reversed.

MR. JUSTICE DAY did not participate in the consideration or decision of this case.